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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. , Misc.

GENERAL ATOMIC COMPANY,
Petitioner,

v.

THE HONORABLE EDWIN L. FELTER, JUDGE,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF MANDAMUS TO THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT, SANTA FE COUNTY, NEW MEXICO

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THE HONORABLE EDWIN L. FELTER, JUDGE,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS TO THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT, SANTA FE COUNTY, NEW MEXICO

Petitioner, General Atomic Company, respectfully moves the Court for leave to file the Petition For Writ of Mandamus annexed hereto. The reasons for granting this Motion are stated in the petition.

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Dated: March 3, 1978

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THE HONORABLE EDWIN L. FELTER, JUDGE,
Respondent.

PETITION FOR WRIT OF MANDAMUS TO THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT, SANTA FE COUNTY, NEW MEXICO

The petitioner respectfully prays that a writ of mandamus issue to the Honorable Edwin L. Felter, Judge, District Court for the First Judicial District, Santa Fe County, New Mexico, directing him to vacate the decisions and orders entered on December 16 and 27, 1977, in which he (1) stayed federal arbitration proceedings which this Court, in *General Atomic Co.* v. *Felter*, 98 S.Ct. 76 (1977), held petitioner had a right to pursue, and (2) declined to stay trial proceedings in his court pending prosecution of federal arbitrations.

OPINIONS BELOW

Respondent, the Honorable Edwin L. Felter, a New Mexico trial judge, issued an unreported opinion on December 16, 1977. The opinion, entitled "Decision of the Court," appears at App. A, pp. 1a-8a, *infra*. The opinion contains Judge Felter's findings of fact and conclusions of law, including his conclusion that "[t]he arbitration proceedings heretofore filed by GAC against UNC should be stayed." Judge Felter's opinion was accompanied by a "Partial Final Judgment" which appears at App. B, pp. 9a-10a, *infra*.

On December 27, 1977, Judge Felter issued a second opinion, also styled "Decision Of The Court," which is virtually identical to his prior opinion. App. C, pp. 11a-19a, *infra*. This second opinion was accompanied by another "Partial Final Judgment," which appears at App. D, pp. 20a-21a, *infra*. In this second "Partial Final Judgement," Judge Felter declined to stay trial proceedings pending arbitration.

On January 13 and again on February 1, 1978, the New Mexico Supreme Court denied petitioner's applications for an order staying trial proceedings pending review of Judge Felter's order staying arbitration. The State Supreme Court's orders appear at App. E, pp. 22a-24a, *infra*.

JURISDICTION

The orders which are challenged in this Petition were issued on December 16, 1977 and December 27, 1977. On January 13, 1978, the Supreme Court of New Mexico deferred petitioner's application for expedited relief and denied the application for a stay of the trial pending appeal in that Court.[1] On February 1, 1978, it denied an

[1] On February 22, 1978, the New Mexico Supreme Court shortened the briefing schedule for appeal to that court. See note 9 at page 12, *infra*.

application for a stay of the trial pending review by this Court. This Court's jurisdiction is invoked under 28 U.S.C. § 1651. *E.g.*, *Vendo Co.* v. *Lektro-Vend Co.*, No. 76-156, decided on "Motion for Clarification of Mandate," January 23, 1978; *Deen* v. *Hickman*, 358 U.S. 57 (1958). Service of the Motion and Petition has been made on Judge Felter, the respondent in *General Atomic Co.* v. *Felter*, 98 S.Ct. 76 (1977), and on the parties in *United Nuclear Corp.* v. *General Atomic Co.*, No. 50827, First Judicial District, Santa Fe County, New Mexico.

QUESTIONS PRESENTED

1. Whether the respondent disobeyed this Court's *per curiam* decision in *General Atomic Co.* v. *Felter*, No. 76-1640 (decided October 31, 1977), 98 S.Ct. 76, when he again barred petitioner's efforts to arbitrate its dispute with UNC on the ground that the right to arbitrate had been "waived" because it had not been asserted during a period consisting predominantly of the time when GAC had been precluded from arbitrating by respondent's own prior invalid injunction against arbitration.

2. Whether disobedience of this Court's mandate should be promptly remedied by writ of mandamus so that arbitration will not continue to be unnecessarily deferred.

STATEMENT

Respondent is a New Mexico trial judge who is presiding over the case of *United Nuclear Corporation* v. *General Atomic Company* (*"UNC* v. *GAC"*), No. 50827, First Judicial District, Santa Fe County, New Mexico, which involves more than 700 million dollars. On April 2, 1976, respondent issued an injunction barring GAC from pursuing federal remedies, including arbitration, against UNC. On October 31, 1977, respondent's unlawful injunction was reversed by this Court in a *per curiam* decision which specifically confirmed GAC's right to seek

federal arbitration. However, on December 16, 1977, after GAC had instituted federal arbitration claims against UNC, respondent issued an illegal stay order which had the practical effect of again enjoining GAC from arbitrating. The plainly improper basis for this second order was that GAC had allegedly waived its right to arbitrate by not demanding arbitration during a period comprised predominantly of the time when GAC was precluded from arbitrating by respondent's own prior illegal injunction.

This unusual application for mandamus is being sought because, by his order of December 16, respondent has stripped GAC of a right previously confirmed by this Court, has flouted the decision of the Court entered against him less than two months before, and has unlawfully attempted to reserve for himself total control over all the legal and factual issues related to this enormous and highly consequential litigation. If reversal of respondent's new and plainly illegal injunctive order barring arbitration must await plenary review in the New Mexico Supreme Court, the decision issued by this Court on October 31, 1977 will have been successfully evaded and the rights recognized therein may be mooted. Accordingly, the disobedience of this Court's mandate should be corrected now by the issuance of a writ of mandamus.

1. Background

The litigation in respondent's court primarily concerns obligations under a 1973 supply contract pursuant to which UNC is obligated to supply uranium at fixed prices to GAC. GAC in turn is obligated to resell much or all of the uranium to various utilities under separate agreements which are directly related to the 1973 supply contract. These separate but related agreements originally

required UNC to sell uranium to the utilities but have now been assigned to GAC.[2]

Between 1973 and 1975 prevailing uranium prices on the open market increased sharply, resulting in a considerable difference between the market price and the price fixed in the UNC-GAC supply contract. Thus, in late 1975 UNC brought suit in the New Mexico courts to have its uranium supply contract with GAC declared void, so that UNC would be free to sell its uranium at higher prices on the open market.

In an effort to avoid a "substantial risk of inconsistent adjudications," *General Atomic Co.* v. *Felter*, *supra*, 98 S.Ct. at 78, n. 11, between the New Mexico litigation and proceedings involving GAC's obligations to the utilities, GAC sought to litigate related disputes in combined actions. For this purpose, a federal interpleader suit was filed in the United States District Court for the District of New Mexico, but failed on technical jurisdictional grounds.[3] GAC also manifested an intent to seek

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[2] Between 1966 and 1971, UNC entered agreements to supply uranium to various utility companies, including Duke Power, Commonwealth Edison, Detroit Edison, and Indiana and Michigan Electric Co. UNC's obligations to supply uranium under the agreements were subsequently assigned to GAC's predecessors, and ultimately to GAC. Concomitant with the first two assignments, UNC became obligated to supply the assignees with uranium which the assignees would then resupply to the utilities. Thus, the 1973 supply agreement discussed in the text is a contract under which UNC reaffirmed its obligation to supply uranium to an assignee which would resupply it to the utilities.

[3] In its complaint in the interpleader action, GAC specifically reserved its right to arbitrate if the interpleader failed. And though it felt bound to affirm the dismissal of the interpleader on jurisdictional grounds, the Court of Appeals for the Tenth Circuit made the following observation (*General Atomic Co.* v. *Duke Power Co.*, 553 F.2d 53, 56 (1977)):

> We are acutely aware that the plaintiff finds itself in a most difficult trap. We are also aware that the public interest might well be served if all of the lawsuits could be brought together under a single roof. As the plaintiff points out, it is threatened

arbitration by stating, in its answer to UNC's complaint, that if it had to arbitrate issues involving Duke Power Company and Commonwealth Edison Company in pending federal arbitrations brought by these utilities, then GAC desired arbitration of the same issues against UNC in the same proceedings.

On April 2, 1976—even before GAC's answer had been filed—Judge Felter issued an order which barred GAC from litigating or arbitrating the underlying issues in forums other than his court.[4] Without issuing a written opinion, the New Mexico Supreme Court refused to disturb this injunction. This Court initially granted certiorari and remanded the case to the New Mexico Supreme Court for an indication as to whether its decision was based on state or federal grounds. 429 U.S. 973 (1976). Once the State Supreme Court issued a clarification, the case was returned to this Court's docket by a petition for writ of certiorari filed by GAC. No. 76-1640. The two arguments made in GAC's petition were that Judge Felter's injunction

(1) "unconstitutionally inhibits petitioner's access to and rights in federal courts"; and

(2) "unconstitutionally deprives petitioner of its federal rights to arbitration of disputes."

See Petition for Writ of Certiorari, No. 76-1640, Table of Contents and pp. 17, 20. The Statement of Facts dwelt at substantial length on the arbitration provisions of the 1973 agreement and related contracts, and on GAC's pending arbitrations with two utility companies (pp. 12-15 and footnotes on the cited pages).[5]

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with not only a number of lawsuits, but conflicting adjudications.

[4] The injunction was preceded by a temporary restraining order issued on March 15, 1976.

[5] UNC's Brief in Opposition argued that GAC had lost any right to secure arbitration because it "has not heretofore presented any claim of rights under the Federal Arbitration Act." (Br. in Opp. 6-9.) GAC rebutted this erroneous assertion at pp. 6-8 of its Reply.

On October 31, 1977, the Court issued a *per curiam* decision which summarily reversed the judgment of the New Mexico Supreme Court and remanded the case. This Court specifically addressed the effect of Judge Felter's order upon GAC's right to secure arbitration (98 S.Ct. at 79; emphasis added, footnotes omitted):

> What the New Mexico Supreme Court has described as 'harassment' is principally GAC's desire to defend itself by impleading UNC in the federal lawsuits *and federal arbitration proceedings brought against it by the utilities.* This, of course, is something which GAC has every right to attempt to do under Fed. Rule Civ. Proc. 14 *and the Federal Arbitration Act.* The right to pursue federal remedies and take advantage of federal procedures and defenses in federal actions may no more be restricted by a state court here than in *Donovan.* Federal courts are fully capable of preventing their misuse for purposes of harassment.

A footnote specifically addressed the pending arbitration proceedings (*id.* at n.11):

> The injunction has also prevented GAC from asserting claims against UNC under the arbitration provision of the 1973 uranium supply agreement in the pending arbitration proceeding instituted against GAC and UNC by Commonwealth prior to its issuance, even though the District Court granted Commonwealth's demand for arbitration and the Seventh Circuit has affirmed. *Commonwealth Edison Co.* v. *Gulf Oil Corp.*, 400 F. Supp. 888 (N.D. Ill. 1975), *aff'd*, 541 F.2d 1263 (1976). In addition, the Western District of North Carolina federal court has refused to stay arbitration between Duke and GAC in a proceeding also instituted prior to the injunction,

despite GAC's contention that UNC was an indispensable party to any such arbitration proceeding which it was prevented from impleading by the injunction. The court acknowledged, however, that UNC would be a proper party to the proceeding. *General Atomic Co.* v. *Duke Power Co.*, 420 F. Supp. 215 (1965).

2. Judge Felter's Response to This Court's Decision

On November 3, 1977, Judge Felter was formally notified of this Court's decision and was asked to withdraw his injunction against arbitration. However, he refused to act on November 3,[6] and did not withdraw the earlier order until formal receipt on November 28 of a peremptory writ from the New Mexico Supreme Court pursuant to this Court's mandate. Instead, Judge Felter proceeded with the trial, which had begun on the day of this Court's decision, and in which no substantive witness was heard until November 10, 1977.

When the New Mexico Supreme Court's writ was formally transmitted to Judge Felter on November 28 pursuant to this Court's mandate, Judge Felter issued an order that "amended and modified" the invalid order he had issued on April 2, 1976, by simply "exclud[ing] from its terms and conditions all *in personam* actions in federal courts and all other matters mandated to be excluded from the operation of the preliminary injunction by the opinion of the Supreme Court, dated October 31, 1977." In all other respects, his order of November 28 declared, the earlier injunction was to "remain of full force and virtue." *See* App. G, p. 27a, *infra*.

On the following day, November 29, 1977, GAC filed a demand for arbitration with UNC of issues growing

[6] In again refusing to act on November 7, Judge Felter stated that he agreed with the dissenting opinion of Mr. Justice Rehnquist rather than with the majority decision, and that he was capable of protecting litigants against inconsistent results. App. F, pp. 25a-26a, *infra*.

out of their 1973 agreement. The demand, filed with the American Arbitration Association in San Diego, California, cited the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, and the arbitration clause (Article XVII) of the 1973 agreement. Within a few days thereafter, GAC also filed a demand for arbitration against UNC in the arbitration proceedings involving Duke Power Company, and moved for permission to file a cross-claim against UNC in the arbitration proceedings involving Commonwealth Edison. GAC then requested Judge Felter to stay trial proceedings with respect to issues subject to these arbitration demands.

UNC opposed the requested stay of the trial and asked Judge Felter to halt the arbitration proceedings for substantially the same reasons set out in its prior Brief in Opposition in this Court. In addition, UNC invoked the provisions of the New Mexico Arbitration Act, N.M.S.A. §§ 22-3-9, *et seq.*, as a basis for staying the arbitration.

3. Judge Felter Again Stays Arbitration

On December 16, 1977, Judge Felter issued a "Decision of the Court" in which he concluded that "GAC has waived and is in default of all rights it may have had to have its disputes with UNC determined in arbitration" (App. A, p. 8a, *infra*).[7] The basis for this conclusion was that "[a]t no point between the commencement of the first action . . . and the filing of the pending Motion for Stay (a period of more than two years), did GAC file a demand for arbitration, petition any court for an order compelling arbitration, petition this court for a stay of proceedings pending arbitration, or in any way manifest its intention or desire to arbitrate rather than litigate the issues between the parties arising under the 1973 Supply Agreement" (App. A, p. 4a, *infra*). Although he referred to his

[7] Judge Felter held no evidentiary hearing on the question of waiver.

invalid order of April 2, 1976, Judge Felter did not explain how GAC was expected to "file a demand for arbitration" or "petition any court for an order compelling arbitration" or "petition this court for a stay of proceedings pending arbitration" without violating his earlier order which had barred the "institution or prosecution of . . . arbitration proceedings . . . or any other method or manner of instituting or prosecuting actions . . . relating to the subject matter of this lawsuit . . . ."

Accompanying the "Decision" of December 16 was a "Partial Final Judgment" which had the same effect upon GAC's rights to secure arbitration under the Federal Arbitration Act as Judge Felter's order of April 2, 1976. The three operative paragraphs of the "judgment" of December 16, 1977, are as follows (App. B, p. 10a, *infra*):

> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that United Nuclear Corporation's Application for Order Staying Arbitrations and Partial Final Judgment, be and the same hereby is granted.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that further arbitration proceedings predicated upon the following demands for arbitration made by Defendant General Atomic Company against Plaintiff United Nuclear Corporation in the following arbitration proceedings, viz:
>
> A. The Demand for Arbitration filed by General Atomic Company on November 29, 1977 with the American Arbitration Association for arbitration of the disputes arising under the 1973 Supply Agreement, a copy of which is attached to GAC's Motion to Stay Proceedings,
>
> B. *Duke Power Company* v. *GAC*, Case No. 31-10-0009-76, in Charlotte, North Carolina.
>
> C. *Commonwealth Edison Company* v. *UNC, GAC and Gulf*, Case No. 61-10-0106-74-C in Chicago, Illinois shall be, and each of them hereby are, stayed until the further order of the Court, Provided, however, that this Partial Final Judgment shall not, in and of itself, operate to preclude Defendant General Atomic Company from asserting claimed federal rights in appropriate judicial proceedings.
>
> IT IS FURTHER ORDERED, DECLARED, DETERMINED AND ADJUDICATED that Defendant General Atomic Company has no right to arbitrate any issue in the aforesaid arbitration proceedings or pending herein against Plaintiff United Nuclear Corporation.

On December 27, 1977, in a virtually identical "Decision" and a "Partial Final Judgment,"[8] Judge Felter denied GAC's request to stay the proceedings in his court pending prosecution of federal arbitrations. Added to his brief order was the same statement which had appeared in the earlier order reciting that the judgment did not "preclude [GAC] . . . from asserting claimed federal rights in appropriate judicial proceedings." (App. D, p. 21a, *infra.*)

4. Appellate Review Is Sought

On December 28, 1977, GAC filed a notice of appeal from both "Partial Final Judgments" (App. H, pp. 28a-29a, *infra*), and on January 4, 1978, the appeal was certified to the Supreme Court of New Mexico (App. I, pp. 30a-31a, *infra*). On the following day—January 5—GAC asked the New Mexico Supreme Court for an expedited briefing and argument schedule and for a stay of the trial pending appellate review (App. J, pp. 47a-50a, *infra*). GAC argued (App. J, p. 48a, *infra*):

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[8] The virtually identical "Decision[s]" of December 16 and December 27 were not composed by Judge Felter. They were verbatim adoptions of "Decision[s]" submitted to him by UNC. Indeed, the second "Decision" was not even retyped from the proposal submitted by UNC.

that the Court below erroneously stayed arbitrations under the Federal Arbitration Act commenced by GAC in other states, which stays are equivalent to a reinstitution of the previous illegal injunction issued below, in violation of GAC's rights under that Act and the prior United States Supreme Court decision in this case.

UNC opposed all interim relief and any expedition of the appeal. On January 13, 1978, the New Mexico Supreme Court deferred action on GAC's motion for expedition [9] and denied GAC's motion for a stay of the trial (App. E, p. 22a, *infra*).

GAC again requested a stay of the trial pending review in this Court of the issues presented by the partial final judgments and by a separate discovery order which interfered with foreign relations and which is the subject of a petition for a writ of certiorari being filed contemporaneously with the present petition. On February 1, 1978, the New Mexico Supreme Court denied the requested stay insofar as it affects the present motion (App. E, p. 24a, *infra*).

REASONS FOR GRANTING THE WRIT

1. Judge Felter's Orders Flout the Decision of This Court

Relying on a patently unsound theory of "waiver," Judge Felter has reinstituted his ban on arbitration that took effect on April 2, 1976, when he initially entered an unconstitutional injunctive order. For more than 20 months, his order prevented GAC from bringing the issues under the 1973 agreement to arbitration and from joining portions of its dispute with UNC to two pending arbitration proceedings. This Court rejected the legal theory under which Judge Felter claimed exclusive au-

[9] The record was filed in the New Mexico Supreme Court on February 20, and the New Mexico Supreme Court has, since that time, reduced the time for filing UNC's brief from 30 to 20 days. It appears now that no decision could be issued by the New Mexico Supreme Court before mid-April, at the earliest.

thority to decide these most important factual and legal issues. Nonetheless, he has continued to maintain such authority and, by proceeding with his trial while staying arbitration, Judge Felter apparently intends to be the first to resolve the issues.

In its decision of October 31, 1977, this Court explicitly recognized that Judge Felter could not interfere with GAC's "right to pursue federal remedies and take advantage of federal procedures and defenses in federal actions. . . ." The *per curiam* opinion plainly contemplated arbitration proceedings as one of the available "federal remedies" or "federal procedures and defenses." [10] Yet GAC now finds such procedures "stayed," and it is told by a State judicial authority that this federal right has been lost.

Judge Felter's "waiver" theory, based on GAC's alleged failure to demand arbitration, is unsound on its face and has, in fact, already been rejected by this Court. As we have previously noted, GAC hardly could be deemed to have "waived" a right that it could not assert for 20 months without violating a court order.[11] Moreover, the mere fact that Judge Felter found it necessary to include arbitration in his unconstitutional order of April 2, 1976, demonstrates that even at that early date—before an answer was even filed in this case—GAC's desire to arbitrate was known to the participants in the Santa Fe trial.[12] Moreover, GAC's explicit reference to arbitra-

[10] In a footnote, the Court also stated that "[i]t is impossible, of course, to foresee all the occasions during the course of this complex litigation in which GAC could justifiably assert claims in federal proceedings."

[11] Although it involved a different context, this Court's observation in *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938), is relevant: "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

[12] All participants knew that, if judicial supervision of the arbitration was necessary, GAC wished to have it conducted under the direction of a federal court. It obviously would have been futile

tion in its answer filed on May 5, 1976, demonstrates that it even then sought that remedy. Nor do the self-contradictory references to "claimed federal rights in appropriate judicial proceedings" in the December 16 and December 27 orders make those orders consistent with this Court's decision. The "claimed federal right" that GAC has been seeking is the right to arbitrate, and that right may again be exercised only in violation of Judge Felter's order.

Finally, the very same grounds that Judge Felter relied upon in reaching his "Decision[s] of the Court" were before this Court on its consideration of GAC's petition for a writ of certiorari. This Court rejected the "waiver" argument when it remanded the case with specific reference to the arbitration remedy. Judge Felter has violated this Court's mandate by sustaining the very same claim that this Court rejected.

2. Further Delay Would Not Serve the Ends of Justice

We are filing this application here and seeking to invoke this Court's mandamus jurisdiction even though the Supreme Court of New Mexico has not given the matter plenary attention. The simple reason is that additional delay will substantially undermine the right to arbitration which GAC has properly desired to invoke for more than the past 20 months. There is presently a trial going on before Judge Felter, and the expense of that proceeding is enormous. If correction of Judge Felter's illegal order must first await action by the New Mexico Supreme Court (which is not prepared to act immediately on this matter), the trial may reach a conclusion before arbitration can even begin. The legal and practical effects of judi-

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or self-defeating for GAC to have sought arbitration to be supervised by Judge Felter. This Court recognized, in its decision of October 1, 1977, that the selection of a federal forum was constitutionally protected.

cial findings by Judge Felter upon such arbitration cannot be fully anticipated. It is important, therefore, that this latest effort to stand in the way of a proper federally enforceable remedy be set aside, so that GAC may promptly exercise rights that have improperly been denied for an extended period of time.

Moreover, the right to arbitrate being invoked here has been described by this Court as a procedure which, "when selected by the parties to a contract, [should] be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). This "unmistakably clear congressional purpose" of the Federal Arbitration Act will be defeated if there is now more delay.

There is, of course, no jurisdictional bar to the issuance of a writ of mandamus from this Court directly to Judge Felter. This Court's very recent ruling in *Vendo Co.* v. *Lektro-Vend Co.*, No. 76-156 (January 23, 1978), stated that:

> . . . an action for mandamus . . . is available to a party who has prevailed in this Court if the lower court 'does not proceed to execute the mandate, or disobeys and mistakes its meaning' . . .

In that case, the Court suggested that pursuant to Rule 31 of the Rules of this Court, it would be appropriate to serve a petition such as this one on the judge or judges who have disobeyed or mistaken the ruling of this Court:

> If Petitioner is of the view that the District Court to which the case was remanded is failing to carry out the judgment of this Court, its remedy is by motion for leave to file a writ of mandamus pursuant to Rule 31, including service of the motion or petition upon the judge or judges to whom the writ would be directed.

That is the procedure we are following with this petition. *See also Deen* v. *Hickman*, 358 U.S. 57 (1958).

CONCLUSION

For the foregoing reasons, the writ of mandamus should issue to vacate the decisions and orders entered by the respondent on December 16 and 27, 1977.

If this Court believes that this matter warrants plenary treatment, we request that either an expedited briefing and argument schedule be established or that a stay of trial proceedings (for which we are applying to the Circuit Justice) be granted.

Respectfully submitted,

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Dated: March 3, 1978

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APPENDIX A

IN THE DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION, a Delaware corporation,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, a partnership composed of GULF OIL CORPORATION and SCALLOP NUCLEAR, INC., *et al.*,
Defendants.

DECISION OF THE COURT

The issue of arbitration having been submitted for summary determination pursuant to § 22-3-10, N.M.S.A. 1953, on December 6, 1977 before this Court sitting without a jury, with Bigbee, Stephenson, Carpenter & Crout appearing as counsel for plaintiff and Rodey, Dickason, Sloan, Akin & Robb; Montgomery, Andrews & Hannahs; and Howrey & Simon appearing as counsel for defendant; the Court having considered the allegations and proof of the parties, argument of counsel and authorities cited, and being otherwise fully advised, finds generally in favor of plaintiff and against defendant and hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff, United Nuclear Corporation (UNC), is a Delaware corporation, and is qualified to do business in New Mexico.

2. Defendant, General Atomic Company (GAC), is a general partnership composed of Gulf Oil Corporation (Gulf), is a Pennsylvania corporation, and Scallop Nuclear, Inc. (Scallop), a Delaware corporation.

3. On August 8, 1975, an action was filed in the District Court of Santa Fe County, Civil Cause No. 50044, entitled *United Nuclear Corporation* v. *General Atomic Company, Gulf Oil Corporation and Scallop Nuclear, Inc.*, defendants, which cause was removed to the United States District Court for the District of New Mexico, Civil Cause No. 75-582-B. Included within the scope of the issues raised by the complaint in that cause were all issues arising under the 1973 Supply Agreement.

4. On September 11, 1975, GAC, Gulf and Scallop filed a Motion for Extension of Time in Civil Cause No. 75-528-B requesting additional time within which to answer or otherwise plead to UNC's complaint and to answer or object to UNC's interrogatories. As grounds for their motion, movants stated that the time was necessary to determine whether to seek arbitration of the issues. GAC has known at all material times that it had a right to demand arbitration against UNC.

5. On October 6, 1975, Gulf Oil Corporation filed a Motion for Extension of Time in Civil Cause No. 75-528-B, acknowledging in that motion that failure to demand arbitration prior to answering the complaint or filing such answer without asserting the affirmative defense of compulsory arbitration might constitute a waiver of Movant's right to compel arbitration.

6. On December 31, 1975, following its voluntary dismissal of Cause No. 75-528-B in the United States District Court for the District of New Mexico, UNC filed suit against GAC in the District Court of Santa Fe County, Civil Cause No. 50827. Interrogatories were served upon GAC simultaneously with service of the complaint. The complaint and the interrogatories, both virtually identical to those filed in Cause No. 50044, included

within their scope all of the issues arising out of the 1973 Uranium Supply Agreement. GAC disqualified, on the grounds of bias, the Honorable Santiago Campos from presiding in said cause.

7. On January 19, 1976, GAC filed a federal interpleader action in United States District Court for the District of New Mexico, Civil Cause No. 76-092-B, against UNC, Duke Power Company (Duke), Commonwealth Edison Company (Commonwealth), Indiana & Michigan Electric Company (I&M) and Detroit Edison Company (Detroit). GAC's complaint, while stating that it was not waiving its right to arbitration, sought judicial determination of the rights and obligations of all the parties in that cause under the 1973 Supply Agreement and the various utility agreements. That cause was dismissed by order entered on March 2, 1976 for lack of subject matter jurisdiction. GAC appealed and the dismissal was affirmed in April of 1977. *General Atomic Co.* v. *Duke Power Co., et al.*, 553 F.2d 53 (10th Cir. 1977).

8. No jurisdictional issue in this cause remains. Jurisdiction of the trial court was affirmed by the New Mexico Supreme Court in an appeal brought by GAC. *United Nuclear Corporation* v. *General Atomic Co.*, 560 P.2d 161 (1976).

9. On May 5, 1976, GAC, after having sought and obtained an extension of time within which to answer, filed its answer to UNC's complaint, and a counterclaim against UNC. In its counterclaim, GAC sought judicial determination of the respective rights and obligations of GAC and UNC under the 1973 Uranium Supply Agreement, an order directing specific performance of those obligations and monetary damages, both compensatory and punitive. GAC also alleged that UNC had violated the New Mexico Antitrust Statutes, § 49-1-1, *et seq.*, N.M.S.A., 1953 and sought over 1 billion dollars in damages for said violation.

10. In its Eighth Defense contained in its Answer, GAC stated that some of the issues in this case are subject to arbitration and that it anticipated becoming involved in arbitration with Duke Power Company (Duke) and Commonwealth Edison Company (Commonwealth), and wanted UNC to be a party to those proceedings. GAC specifically excluded from the scope of its arbitration demand all other arbitrable issues, including any concerning the validity and enforceability of the 1973 Uranium Supply Agreement. GAC further stated that to the extent possible, it intended to conduct the arbitration of the issues jointly with the arbitration of the same issues between the respective power companies and itself.

11. On June 4, 1976, UNC filed its Reply to defendant's counterclaims. At that time, all issues related to the 1973 Supply Agreement were before the court on the pleadings of the parties. All of the issues raised are inextricably intertwined with the antitrust allegations raised by both parties.

12. At no point between the commencement of the first action, filed as Cause No. 50044 in District Court for Santa Fe County, New Mexico, and the filing of the pending Motion for Stay (a period of more than two years), did GAC file a demand for arbitration, petition any court for an order compelling arbitration, petition this court for a stay of proceedings pending arbitration, or in any way manifest its intention or desire to arbitrate rather than litigate the issues between the parties arising under the 1973 Supply Agreement.

13. On April 2, 1976, the court preliminarily enjoined GAC, its partners, privies, agents, servants and employees, from filing or prosecuting any other action against UNC in any other forum relating to any of the rights, claims, or the subject matter of this action. The injunction was sought and issued in the context of GAC's announced intention of instituting litigation against UNC in other

jurisdictions and of joining UNC in pending or contemplated arbitration proceedings instituted by the utilities. The preliminary injunction did not prohibit GAC from demanding arbitration with UNC in this forum.

14. Two utilities, Duke and Commonwealth, have demanded arbitration with GAC pursuant to arbitration clauses contained in the Duke and Commonwealth La Salle agreements. These contracts contain no arbitration agreements between GAC and UNC.

15. In December of 1976, GAC moved to join as parties two utilities—I&M and Detroit. I&M consented to joinder and Detroit was joined by order of the Court.

16. Pursuant to its defense against the claims stated by UNC and in attempt to prove the claims stated in its counterclaim, GAC engaged in extensive discovery in this case, taking more than 100 depositions totaling more than 16,000 pages of testimony and involving 2,785 deposition exhibits. GAC copied more than 500,000 pages of documents produced to it during discovery at UNC's corporate offices from early May until June, 1977. GAC also propounded and received answers to two voluminous sets of interrogatories served on UNC.

17. On August 22, 1977, the Pretrial Order was signed. GAC drafted the portion of the Order which related to its claims against UNC. In this Order, GAC did not state arbitration as a defense to the claims arising under the 1973 Supply Agreement, nor did it indicate an intention or a desire to resolve the disputed issues by arbitration rather than litigation.

18. On September 19, 1977, GAC filed a Motion for Partial Summary Judgment. Pursuant to that motion, GAC sought a judicial determination that the 1973 Supply Agreement was not procured by fraud or coercion, that the Agreement was not in violation of the New Mexico

Antitrust Laws, that UNC had subsequently ratified the 1973 Supply Agreement, and that UNC's performance of the 1973 Supply Agreement is not excused on the grounds of commercial impracticability. On October 27, 1977, the court rendered a judicial determination that the Motion for Summary Judgment was not well taken and the Motion was, therefore, denied.

19. On October 31, 1977, the parties to this cause proceeded with the trial on the merits and said trial has continued for more than a month.

20. In numerous instances, GAC has invoked the appellate jurisdiction of the courts of New Mexico by filing appeals or petitioning for writs of prohibition or superintending control relating to jurisdiction of the trial court, failure to disqualify plaintiff's counsel, entry of the preliminary injunction, failure to join indispensable parties, failure to grant a continuance of the trial and to obtain a modification of the preliminary injunction pursuant to the opinion of the United States Supreme Court.

21. GAC has repeatedly, during the course of these proceedings, obtained Orders allowing extensions of time to file motions; to respond to motions; to file memoranda; to compel discovery; to respond to discovery at all times representing to the court that such Orders were necessary for its preparation for trial.

22. On November 28, 1977, GAC declared in open court that it intended to pursue relief under the Federal Arbitration Act and requested the court to stay the trial of this case pending resolution of those matters. The court declined to stay proceedings.

23. On November 30, 1977, GAC filed a motion for a stay of all proceedings in this action on the grounds that it had that day demanded arbitration between GAC and

UNC on all issues relating to the validity, enforceability and interpretation of the 1973 Supply Agreement.

24. From the commencement of the original action until the present, UNC has made tremendous expenditures of time, effort and money in the preparation of its case for trial on the merits and in providing to GAC all of the materials which it sought in discovery to which it was entitled under the Rules of Civil Procedure of the State of New Mexico.

25. As a result of its discovery efforts undertaken in this judicial proceeding pursuant to the Rules of Civil Procedure of New Mexico, GAC has acquired huge amounts of information from UNC which would not otherwise be available to it.

26. UNC has been prejudiced by GAC's failure to timely demand arbitration and UNC will be irreparably injured if the proceedings in this cause were stayed and arbitration ordered.

27. From the commencement of the original action in August, 1975, until the filing of the present motion, a period of more than 27 months, GAC has, with knowledge of its rights, not demanded, or sought to compel arbitration with UNC. GAC is in default and has voluntarily and intentionally relinquished any rights it may have had to arbitrate with UNC.

28. The arbitration clause contained in Article XVII of the 1973 Supply Agreement is limited in scope to those issues which may be resolved by an application of the terms and conditions of the 1973 Supply Agreement.

29. The 1974 Uranium Concentrates Agreement contains no arbitration clause.

30. There is no just reason to delay the entry of a partial final judgment herein in accordance with these Findings of Fact and Conclusions of Law.

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to §§ 22-3-9, *et seq.*, N.M.S.A., 1953, to stay arbitration proceedings between UNC and GAC.

2. GAC has claimed that it is entitled to assert certain rights under the Federal Arbitration Act. This Court's order staying arbitration proceedings shall not in and of itself, operate to preclude GAC from asserting its claimed federal rights in appropriate judicial proceedings. GAC has waived and is in default of all rights it may have had to have its disputes with UNC determined in arbitration.

3. Neither the Duke nor Commonwealth Agreements give GAC any rights to demand arbitration with UNC.

4. The arbitration clause of the 1973 Supply Agreement, if valid, allows only those issues which may be resolved by an application of the terms and conditions of the 1973 Supply Agreement to be submitted to arbitration.

5. The issues arising under the New Mexico Antitrust Laws, § 49-1-1, *et seq.*, N.M.S.A., 1953 may not be submitted to arbitration.

6. All issues in this case are so intertwined with issues arising under the New Mexico Antitrust Laws that none of the issues can properly be submitted to arbitration.

7. There is no just reason to delay the entry of a partial final judgment in accordance with these findings of fact and conclusions of law.

8. The arbitration proceedings heretofore filed by GAC against UNC should be stayed.

/s/ Edwin L. Felter
District Judge

APPENDIX B

IN THE DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, *et al.*,
Defendants.

PARTIAL FINAL JUDGMENT

This matter having come on to be heard before the Court upon plaintiff United Nuclear Corporation's Application for Order Staying Arbitrations and Partial Final Judgment, the parties having appeared by their respective counsel of record and the Court now being sufficiently advised, and

The Court having thereafter made and entered its findings of fact and conclusions of law in respect to the issues raised by said Application, and

It further appearing to the Court that pursuant to the provisions of Rule 54(b) (1) in the New Mexico Rules of Civil Procedure, and the Uniform Arbitration Act, 23-3-9, *et seq.*, N.M.S.A., 1953 (1975 Supp.), there is no just reason for delay in the entry of a partial final judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that United Nuclear Corporation's Application for Order Staying Arbitrations and Partial Final Judgment, be and the same hereby is granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that further arbitration proceedings predicated upon the following demands for arbitration made by Defendant General Atomic Company against Plaintiff United Nuclear Corporation in the following arbitration proceedings, viz:

A. The Demand for Arbitration filed by General Atomic Company on November 29, 1977 with the American Arbitration Association for arbitration of the disputes arising under the 1973 Supply Agreement, a copy of which is attached to GAC's Motion to Stay Proceedings,

B. *Duke Power Company* v. *GAC*, Case No. 31-10-0009-76, in Charlotte, North Carolina,

C. *Commonwealth Edison Company* v. *UNC, GAC and Gulf*, Case No. 51-10-0106-74-C in Chicago, Illinois

shall be, and each of them hereby are, stayed until the further order of the Court, Provided, however, that this Partial Final Judgment shall not, in and of itself, operate to preclude Defendant General Atomic Company from asserting claimed federal rights in appropriate judicial proceedings.

IT IS FURTHER ORDERED, DECLARED, DETERMINED AND ADJUDICATED that Defendant General Atomic Company has no right to arbitrate any issue in the aforesaid arbitration proceedings or pending herein against Plaintiff United Nuclear Corporation.

/s/ Edwin L. Felter
District Judge

APPENDIX C

IN THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION, a Delaware corporation,
Plaintiff,

v.

GENERAL ATOMIC COMPANY, a partnership composed of GULF OIL CORPORATION and SCALLOP NUCLEAR, INC., *et al.*,
Defendants.

DECISION OF THE COURT

Defendant, General Atomic Company, having filed a motion to stay these proceedings, with Bigbee, Stephenson, Carpenter and Crout appearing as counsel for plaintiff and Rodey, Dickason, Sloan, Akin & Robb; Montgomery, Andrews & Hannahs; and Howrey & Simon appearing as counsel for defendant; the Court having considered the allegations and proof of the parties, argument of counsel and authorities cited, and being otherwise fully advised, finds generally in favor of plaintiff and against defendant and hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff, United Nuclear Corporation (UNC), is a Delaware corporation, and is qualified to do business in New Mexico.

2. Defendant, General Atomic Company (GAC), is a general partnership composed of Gulf Oil Company (Gulf), is a Pennsylvania corporation, and Scallop Nuclear, Inc. (Scallop), a Delaware corporation.

3. On August 8, 1975, an action was filed in the District Court of Santa Fe County, Civil Cause No. 50044, entitled *United Nuclear Corporation* v. *General Atomic Company, Gulf Oil Corporation and Scallop Nuclear, Inc.*, defendants, which cause was removed to the United States District Court for the District of New Mexico, Civil Cause No. 75-582-B. Included within the scope of the issues raised by the complaint in that cause were all issues arising from the 1973 Supply Agreement.

4. On September 11, 1975, GAC, Gulf and Scallop filed a Motion for Extension of Time in Civil Cause No. 75-528-B requesting additional time within which to answer or otherwise plead to UNC's complaint and to answer or object to UNC's interrogatories. As grounds for their motion, movants stated that the time was necessary to determine whether to seek arbitration of the issues. GAC has known at all material times that it had a right to demand arbitration against UNC.

5. On October 6, 1975, Gulf Oil Corporation filed a Motion for Extension of Time in Civil Cause No. 75-528-B, acknowledging in that motion that failure to demand arbitration prior to answering the complaint or filing such answer without asserting the affirmative defense of compulsory arbitration might constitute a waiver of Movant's right to compel arbitration.

6. On December 31, 1975, following its voluntary dismissal of Cause No. 75-528-B in the United States District Court for the District of New Mexico, UNC filed suit against GAC in the District Court of Santa Fe County, Civil Cause No. 50827. Interrogatories were served upon GAC simultaneously with service of the complaint.

The complaint and the interrogatories, both virtually identical to those filed in Cause No. 50044, included within their scope all of the issues arising out of the 1973 Uranium Supply Agreement. GAC disqualified, on the grounds of bias, the Honorable Santiago Campos from presiding in said cause.

7. On January 19, 1976, GAC filed a federal interpleader action in United States District Court for the District of New Mexico, Civil Cause No. 76-092-B, against UNC, Duke Power Company (Duke), Commonwealth Edison Company (Commonwealth), Indiana & Michigan Electric Company (I&M) and Detroit Edison Company (Detroit). GAC's complaint, while stating that it was not waiving its right to arbitration, sought judicial determination of the rights and obligations of all the parties in that cause under the 1973 Supply Agreement and the various utility agreements. That cause was dismissed by order entered on March 2, 1976 for lack of subject matter jurisdiction. GAC appealed and the dismissal was affirmed in April of 1977. *General Atomic Co.* v. *Duke Power Co., et al.*, 553 F.2d 53 (10th Cir. 1977).

8. No jurisdictional issue in this cause remains. Jurisdiction of the trial court was affirmed by the New Mexico Supreme Court in an appeal brought by GAC. *United Nuclear Corporation* v. *General Atomic Co.*, 560 P.2d 161 (1976).

9. On May 5, 1976, GAC, after having sought and obtained an extension of time within which to answer, filed its answer to UNC's complaint, and a counterclaim against UNC. In its counterclaim, GAC sought judicial determination of the respective rights and obligations of GAC and UNC under the 1973 Uranium Supply Agreement, an order directing specific performance of those obligations and monetary damages, both compensatory and punitive. GAC also alleged that UNC had violated

the New Mexico Antitrust Statutes, § 49-1-1, *et seq.*, N.M.S.A., 1953 and sought over 1 billion dollars in damages for said violation.

10. In its Eighth Defense contained in its Answer, GAC stated that some of the issues in this case are subject to arbitration and that it anticipated becoming involved in arbitration with Duke Power Company (Duke) and Commonwealth Edison Company (Commonwealth), and wanted UNC to be a party to those proceedings. GAC specifically excluded from the scope of its arbitration demand all other arbitrable issues, including any concerning the validity and enforceability of the 1973 Uranium Supply Agreement. GAC further stated that to the extent possible, it intended to conduct the arbitration of the issues jointly with the arbitration of the same issues between the respective power companies and itself.

11. On June 4, 1976, UNC filed its Reply to defendant's counterclaim. At that time, all issues related to the 1973 Supply Agreement were before the court on the pleadings of the parties. All of the issues raised are inextricably intertwined with the antitrust allegations raised by both parties.

12. At no point between the commencement of the first action, filed as Cause No. 50044 in District Court for Santa Fe County, New Mexico, and the filing of the pending Motion for Stay (a period of more than two years), did GAC file a demand for arbitration, petition any court for an order compelling arbitration, petition this court for a stay of proceedings pending arbitration, or in any way manifest its intention or desire to arbitrate rather than litigate the issues between the parties arising under the 1973 Supply Agreement.

13. On April 2, 1976, the court preliminarily enjoined GAC, its partners, privies, agents, servants and employees, from filing or prosecuting any other action against

UNC in any other forum relating to any of the rights, claims, or the subject matter of this action. The injunction was sought and issued in the context of GAC's announced intention of instituting litigation against UNC in other jurisdictions and of joining UNC in pending or contemplated arbitration proceedings instituted by the utilities. The preliminary injunction did not prohibit GAC from demanding arbitration with UNC in this forum.

14. Two utilities, Duke and Commonwealth, have demanded arbitration with GAC pursuant to arbitration clauses contained in the Duke and Commonwealth La Salle agreements. These contracts contain no arbitration agreements between GAC and UNC.

15. In December of 1976, GAC moved to join as parties two utilities—I&M and Detroit. I&M consented to joinder and Detroit was joined by order of the Court.

16. Pursuant to its defense against the claims stated by UNC and in attempt to prove the claims stated in its counterclaim, GAC engaged in extensive discovery in this case, taking more than 100 depositions totaling more than 16,000 pages of testimony and involving 2,785 deposition exhibits. GAC copied more than 500,000 pages of documents produced to it during discovery at UNC's corporate offices from early May until June, 1977. GAC also propounded and received answers to two voluminous sets of interrogatories served on UNC.

17. On August 22, 1977, the Pretrial Order was signed. GAC drafted the portion of the Order which related to its claims against UNC. In this Order, GAC did not state arbitration as a defense to the claims arising under the 1973 Supply Agreement, nor did it indicate an intention or a desire to resolve the disputed issues by arbitration rather than litigation.

18. On September 19, 1977, GAC filed a Motion for Partial Summary Judgment. Pursuant to that motion, GAC sought a judicial determination that the 1973 Supply Agreement was not procured by fraud or coercion, that the Agreement was not in violation of the New Mexico Antitrust Laws, that UNC had subsequently ratified the 1973 Supply Agreement, and that UNC's performance of the 1973 Supply Agreement is not executed on the grounds of commercial impracticability. On October 27, 1977, the court rendered a judicial determination that the Motion for Summary Judgment was not well taken and the Motion was, therefore, denied.

19. On October 31, 1977, the parties to this cause proceeded with the trial on the merits and said trial has continued for more than a month.

20. In numerous instances, GAC has invoked the appellate jurisdiction of the courts of New Mexico by filing appeals or petitioning for writs of prohibition or superintending control relating to jurisdiction of the trial court, failure to disqualify plaintiff's counsel, entry of the preliminary injunction, failure to join indispensable parties, failure to grant a continuance of the trial and to obtain a modification of the preliminary injunction pursuant to the opinion of the United States Supreme Court.

21. GAC has repeatedly, during the course of these proceedings, obtained Orders allowing extensions of time to file motions; to respond to motions; to file memoranda; to compel discovery; to respond to discovery at all times representing to the court that such Orders were necessary for its preparation for trial.

22. On November 28, 1977, GAC declared in open court that it intended to pursue relief under the Federal Arbitration Act and requested the court to stay the trial

of this case pending resolution of those matters. The court declined to stay proceedings.

23. On November 30, 1977, GAC filed a motion for a stay of all proceedings in this action on the grounds that it had that day demanded arbitration between GAC and UNC on all issues relating to the validity, enforceability and interpretation of the 1973 Supply Agreement.

24. From the commencement of the original action until the present, UNC has made tremendous expenditures of time, effort and money in the preparation of its case for trial on the merits and in providing to GAC all of the materials which it sought in discovery to which it was entitled under the Rules of Civil Procedure of the State of New Mexico.

25. As a result of its discovery offering undertaken in this judicial proceeding pursuant to the Rules of Civil Procedure of New Mexico, GAC has acquired huge amounts of information from UNC which would not otherwise be available to it.

26. UNC has been prejudiced by GAC's failure to timely demand arbitration and UNC will be irreparably injured if the proceedings in this cause were stayed and arbitration ordered.

27. From the commencement of the original action in August, 1975, until the filing of the present motion, a period of more than 27 months, GAC has, with knowledge of its rights, not demanded, or sought to compel arbitration with UNC. GAC is in default and has voluntarily and intentionally relinquished any rights it may have had to arbitrate with UNC.

28. The arbitration clause contained in Article XVII of the 1973 Supply Agreement is limited in scope to those issues which may be resolved by an application of the terms and conditions of the 1973 Supply Agreement.

29. The 1974 Uranium Concentrates Agreement contains no arbitration clause.

30. There is no just reason to delay the entry of a partial final judgment herein in accordance with these Findings of Fact and Conclusions of Law.

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to §§ 22-3-9, *et seq.*, N.M.S.A., 1953 (the Uniform Arbitration Act) or 9 U.S.C. § 1 *et seq.* (the Federal Arbitration Act) or both, to determine whether GAC may properly demand arbitration with UNC.

2. GAC has waived any rights to demand arbitration from UNC and has been in default in exercising these purported rights.

3. GAC's motion to stay these proceedings should be denied.

4. GAC has claimed that it is entitled to assert certain rights under the Federal Arbitration Act. This Court's order staying arbitration proceedings shall not in and of itself, operate to preclude GAC from asserting its claimed federal rights in appropriate judicial proceedings. GAC has waived and is in default of all rights it may have had to have its disputes with UNC determined in arbitration.

5. Neither the Duke nor Commonwealth Agreements give GAC any rights to demand arbitration with UNC.

6. The arbitration clause of the 1973 Supply Agreement, if valid, allows only those issues which may be resolved by an application of the terms and conditions of the 1973 Supply Agreement to be submitted to arbitration.

7. The issues arising under the New Mexico Antitrust Laws, § 49-1-1, *et seq.*, N.M.S.A., 1953 may not be submitted to arbitration.

8. All issues in this case are so intertwined with issues arising under the New Mexico Antitrust Laws that none of the issues can properly be submitted to arbitration.

9. There is no just reason to delay the entry of a partial final judgment in accordance with these findings of fact and conclusions of law.

10. The arbitration proceedings heretofore filed by GAC against UNC should be stayed.

/s/ Edwin L. Felter
District Judge

APPENDIX D

IN THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION, a Delaware corporation,
Plaintiff,

v.

GENERAL ATOMIC COMPANY, a partnership composed of GULF OIL CORPORATION and SCALLOP NUCLEAR, INC., *et al.*,
Defendants.

PARTIAL FINAL JUDGMENT

This matter having come on to be heard before the Court upon defendant General Atomic Company's Motion To Stay Proceedings, the parties having appeared by their respective counsel of record and the Court now being sufficiently advised, and

The Court having thereafter made and entered its findings of fact and conclusions of law in respect to the issues raised by said Motion, and

It further appearing to the Court that pursuant to the provisions of Rule 54(b)(1) in the New Mexico Rules of Civil Procedures, and the Uniform Arbitration Act, § 23-3-9, *et seq.*, N.M.S.A., 1953 (1975 Supp.), and the Federal

Arbitration Act, 9 U.S.C. § 1 *et seq.*, there is no just reason for delay in the entry of a partial final judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that General Atomic Company's Motion to Stay Proceedings, be and the same hereby is denied. Provided, however, that this Partial Final Judgment shall not, in and of itself, operate to preclude Defendant General Atomic Company from asserting claimed federal rights in appropriate judicial proceedings.

/s/ Edwin L. Felter
District Judge

APPENDIX E

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
SANTA FE COUNTY

Friday, January 13, 1978

No. 11,775

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,

vs.

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,
Defendant-Appellant,

INDIANA AND MICHIGAN ELECTRIC COMPANY, and THE DETROIT EDISON CO.,
Defendants-Appellees.

In the above cause this Court has ruled that the cause will not be stayed insofar as the trial in the First Judicial District is concerned. The Court will grant an appeal on the problems remaining in the other issues certified to the Supreme Court by the Court of Appeals.

At such time as the transcript is complete and filed in this Court, we will consider an abbreviated schedule of briefing and set the cause down for oral argument as soon as possible.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
SANTA FE COUNTY

Wednesday, February 1, 1978

No. 11,775

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,

vs.

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,
Defendant-Appellant,

INDIANA AND MICHIGAN ELECTRIC COMPANY, and THE DETROIT EDISON CO.,
Defendants-Appellees.

No. 11,777

STATE OF NEW MEXICO, *ex rel.*
GENERAL ATOMIC COMPANY,
Petitioner,

vs.

HON. EDWIN L. FELTER,
Respondent.

ORIGINAL MANDAMUS AND PROHIBITION UNDER POWER OF SUPERINTENDING CONTROL

This matter coming on for consideration by the Court upon Motions of Petitioner and Appellant for Stay of Proceedings, and the Court having considered said motions and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that the motions to stay the trial be and the same are hereby denied.

IT IS FURTHER ORDERED that the trial court be and the same is hereby directed to allow the parties sufficient time prior to the entry of any order or findings of facts based upon its order of November 16, 1977 entered in Cause No. 50827 on the Civil Docket, Santa Fe County District Court, to present to this Court additional motions as may be appropriate.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX F

IN THE DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION, a corporation,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, a partnership composed of GULF OIL CORPORATION and SCALLOP NUCLEAR, INC., INDIANA AND MICHIGAN ELECTRIC CO., and DETROIT EDISON COMPANY,

Defendants.

Santa Fe County Courthouse
Santa Fe, New Mexico

Monday, November 7, 1977

9:30 a.m.

Morning Session

Volume 5

[5-45] THE COURT: The application of the defendant General Atomic Company is a blanket application to dissolve the injunction in its entirety, not just as relates to the Duke and Commonwealth arbitration proceedings. In this connection, common sense tells me that the more forums that are acting upon the subject [5-46] matter of a lawsuit, the more possibility there is for inconsistent results aside from these arbitration proceedings.

I am thoroughly in accord with our system of jurisprudence whereby an inferior court is bound by the mandates from a higher court. This court certainly will comply with any mandate from the New Mexico Supreme Court or the United States Supreme Court. The law requires that. The law does not require that we agree with the appellate decisions. I happen to agree with the opinion of Justice Rehnquist. That is the opinion that is more agreeable to me; the other one may be the one that is more binding upon me. I recognize that.

I think just as the federal courts may be fully capable of protecting a litigant against harassing and vexatious litigation, this Court is just as capable of protecting a litigant against inconsistent results. There are quite a number of questions that remain unanswered. Again, I reiterate that I granted the motion to bring in Detroit Edison and Indiana & Michigan in large part because of the injunction. Had not the injunction been pending, I may have been tempted to disallow that motion.

I am going to deny your application at this [5-47] time and I am going to wait for the mandate. When the mandate comes down, why, I certainly intend to obey it. I am not clear as to just what the mandate is going to embrace. I am assuming that this opinion merely held that state courts cannot enjoin a litigant from filing in personam actions in federal court, which would include arbitration proceedings that may come under federal rights. But certainly it would not touch the Court's injunction insofar as it relates to filing cases in state courts that do not come under federal arbitration proceedings.

So the application will be denied at this time.

We are going to have our recess now for about 15 minutes or so.

(Short recess taken.)

APPENDIX G

IN THE DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, *et al.*,
Defendants.

ORDER

This matter coming before this Court upon the Peremptory Writ of Mandamus made and entered by the New Mexico Supreme Court in Cause No. 10,870 on its docket on the 23rd day of November, 1977;

NOW, THEREFORE, IT IS ORDERED that the preliminary injunction entered in this case by this Court on April 2, 1976 hereby is amended and modified to exclude from its terms and conditions all in personam actions in Federal Courts and all other matters mandated to be excluded from the operation of said preliminary injunction by the opinion of the United States Supreme Court, dated October 31, 1977.

IT IS FURTHER ORDERED that the aforesaid injunction of this Court, except to the extent modified and amended by this order, shall be and remain of full force and virtue.

/s/ Edwin L. Felter
District Judge

APPENDIX H

IN THE DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, *et al.*,
Defendants.

NOTICE OF APPEAL

COMES NOW defendant-appellant General Atomic Company, by and through its attorneys, pursuant to Rule 54(b), N.M.R.Civ.P., and appeals to the Court of Appeals of the State of New Mexico from the partial final judgment entered by the Court on December 16, 1977, and from the partial final judgment entered by the Court on December 27, 1977.

RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.

MONTGOMERY, ANDREWS & HANNAHS

By /s/ Seth D. Montgomery
Attorneys for General Atomic
Company

PROOF OF SERVICE

This will certify that a copy of the foregoing notice was served on opposing counsel by personal service or by mail (as indicated) this 28th day of December, 1977:

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(service by mail)
4400 Republic National Bank Tower
Dallas, Texas 75201

Attorneys for United Nuclear Corporation

Jones, Gallegos, Snead & Wertheim
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and
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Attorneys for The Detroit Edison Company

Johnson, Paulantis & Lanphere
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Simpson, Thacher & Bartlett
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Room 23, Bishop Building
123 West Palace Avenue
Santa Fe, New Mexico 87501

Attorneys for Indiana &
Michigan Electric Company

By /s/ Seth D. Montgomery

APPENDIX I

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO
SANTA FE COUNTY

January 4, 1978

No. 3388

D.C. No. 50827

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,
vs.
GENERAL ATOMIC COMPANY, a partnership composed of GULF OIL CORPORATION and SCALLOP NUCLEAR, INC.,
Defendant-Appellant,
INDIANA AND MICHIGAN ELECTRIC COMPANY; and THE DETROIT EDISON CO.,
Defendants-Appellees.

CERTIFICATION TO THE SUPREME COURT

Pursuant to § 16-7-14(C)(2), N.M.S.A., 1953 (Repl. Vol. 1970) the Court of Appeals is authorized to certify to the Supreme Court issues of substantial public interest that should be determined by the Supreme Court.

Attached hereto and made a part of this Certification is the Motion to certify which recites the reasons why the appeal should be certified and that all parties are in agreement that the appeal should be certified.

It further appears to the Court of Appeals that an issue of substantial public interest is created and should be determined by the Supreme Court.

Now, therefore, pursuant to § 16-7-14(C)(2) *supra*, the above captioned case is certified to the New Mexico Supreme Court for decision.

[SEAL]

/s/ Joe W. Wood
Chief Judge

/s/ B. C. Hernandez
Judge

/s/ Ramon Lopez
Judge

ATTEST: A true copy

/s/ Hazel M. Davis
Clerk of the Court of Appeals
of the State of New Mexico

cc: Clerk, Dist. Ct.
cc: Sp. Ct.
Montgomery
Bigbee
Robb
Leeds
Snead
Cohn
Paulantis
Deering

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

No. 3388

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,

vs.

GENERAL ATOMIC COMPANY, *et al.*,
Defendant-Appellant.

MOTION TO CERTIFY APPEAL

COMES NOW plaintiff-appellee United Nuclear Corporation and pursuant to § 16-7-14C. N.M.S.A. 1953 poration and pursuant to § 16-7-14C., N.M.S.A., 1953 the New Mexico Supreme Court and as grounds therefore states:

1. On December 28, 1977, defendant-appellant General Atomic Company appealed from two final judgments of the District Court of Santa Fe County. One denied a General Atomic Company motion to stay proceedings and the other granted a United Nuclear Corporation application to stay arbitrations. General Atomic Company's Notice of Appeal is attached to this motion as Exhibit A.

2. The partial final judgment appealed from involves an issue of substantial public interest which should be decided by the Supreme Court in that the issue of whether arbitration may be had will determine whether the New Mexico Courts will retain jurisdiction to determine a case whose outcome will effect the entire economy of the State, the tax revenues of the State, and the conservation of New Mexico's irreplaceable natural resources.

3. Defendant-appellant General Atomic Company has contended that the issue of arbitrability involves a significant question of law arising under the Constitution of the United States. Attached to this motion as Exhibit B is a copy of General Atomic's motion filed with the District Court seeking to stay the trial of this case until arbitration could be completed. Exhibit B states that the trial court's failure to stay proceedings pending arbitration would be to deny General Atomic Company rights guaranteed to it by the United States Constitution.

4. Counsel for all parties have concurred that this case is one which should be properly certified to the New Mexico Supreme Court.

5. The New Mexico Supreme Court is intimately familiar with the facts and current posture of this case, having dealt with it on numerous occasions, to wit:

a. No. 10943 (jurisdictional appeal); *United Nuclear Corp.* v. *General Atomic Co.*, 90 N.M. 97, 560 P.2d 161 (1976).

b. No. 10870 (GAC Petition for Writ of Prohibition or Superintending Control requesting dissolution of preliminary injunction and joinder of parties).

c. Nos. 11265 and 11336 (Detroit Edison jurisdictional appeals); *United Nuclear Corp.* v. *General Atomic Co.*, 91 N.M. 570 P.2d 305 (1977).

d. (N.M. Supreme Court injunction opinion); *General Atomic Co.* v. *Felter*, 90 N.M. 120, 560 P.2d 541 (1977). *reversed* 98 S.Ct. 76 (1977).

e. No. 11469 (Appeal from denial of motion to disqualify counsel; dismissed by Supreme Court for lack of jurisdiction).

f. No. 11680 (Petition for Writ of Prohibition or Superintending Control to prevent trial from proceeding as scheduled).

g. U.S. Supreme Court No. 76-1640 (Petition to N.M. Supreme Court for Peremptory Writ of Mandamus to require trial court to immediately conform preliminary injunction with mandate of U. S. Supreme Court.

WHEREFORE, Plaintiff-appellee United Nuclear Corporation prays that the Court issue its Order certifying this appeal to the New Mexico Supreme Court.

BIGBEE, STEPHENSON, CARPENTER and CROUT

By /s/ Donnan Stephenson
Attorneys for Plaintiff-Appellee
United Nuclear Corporation

I hereby certify that a true copy of the foregoing was mailed or hand-delivered to all counsel of record this 29th day of December, 1977.

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Room 23, Bishop Building
123 West Palace Avenue
Santa Fe, New Mexico 87501

Attorneys for Indiana & Michigan Electric Company

By /s/ [Illegible]

IN THE DISTRICT COURT
STATE OF NEW MEXICO

No. 50827

UNITED NUCLEAR CORPORATION,
Plaintiff,
vs.
GENERAL ATOMIC COMPANY, *et al.*,
Defendants.

NOTICE OF APPEAL

COMES NOW defendant-appellant General Atomic Company, by and through its attorneys, pursuant to Rule 54(b), N.M.R.Civ.P., and appeals to the Court of Appeals of the State of New Mexico from the partial final judgment entered by the Court on December 16, 1977, and from the partial final judgment entered by the Court on December 27, 1977.

RODEY, DICKASON, SLOAN, AKIN
& ROBB, P.A.

MONTGOMERY, ANDREWS & HANNAHS

By /s/ Seth D. Montgomery
Attorneys for General Atomic
Company

PROOF OF SERVICE

This will certify that a copy of the foregoing notice was served on opposing counsel by personal service or by mail (as indicated) this 28th day of December, 1977:

Bigbee, Stephenson, Carpenter & Crout
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(personal service)
Room 23, Bishop Building
123 West Palace Avenue
Santa Fe, New Mexico 87501

Attorneys for Indiana &
Michigan Electric Company

By /s/ Seth D. Montgomery

IN THE DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

UNITED NUCLEAR CORPORATION,
Plaintiff,

v.

GENERAL ATOMIC COMPANY, *et al.*,
Defendants.

MOTION FOR A STAY OF PROCEEDINGS

Defendant General Atomic Company ("GAC"), by and through its attorneys, moves this Court for a stay of all proceedings in this case on issues between GAC and United Nuclear Corporation ("UNC") or alternatively, all proceedings pertaining to issues between them arising out of the 1973 Uranium Supply Agreement (except in either event those proceedings described in Paragraph 5 below), and, as grounds for this Motion, states:

1. It is taking action today, pursuant to the Federal Arbitration Act, to join UNC in the arbitration now pending in North Carolina between GAC and Duke Power Company. (A copy of that Demand for Arbitration will be provided to this Court promptly.)

2. It is taking action, pursuant to the Federal Arbitration Act, to crossclaim against UNC in the arbitration now pending in Illinois among GAC, UNC and Commonwealth Edison. (A copy of that crossclaim will be provided to this Court promptly.)

3. It has demanded arbitration, pursuant to the Federal Arbitration Act, between GAC and UNC in San Diego, California, in accordance with the attached Demand for Arbitration (Attachment A) of all of the issues relating to the validity, enforceability and interpretation of the 1973 Uranium Supply Agreement, and all other arbitrable issues pending in this Court.

4. The issues pending in this Court between GAC and UNC which are not subject to the above arbitrations, if any, may be mooted by these arbitrations, or facts determined in those arbitrations may dispose of facts underlying those issues.

5. At this time no stay is being requested of the proceedings on the issues of GAC's and UNC's obligations to Detroit Edison and Indiana & Michigan Electric Co. pending a determination by GAC as to what alternatives have become available to it as to those issues by the recent decisions of the United States Supreme Court and New Mexico Supreme Court, and pending a determination by GAC of what action it may request this Court to take respecting those issues.

6. The 1973 Uranium Supply Agreement is an agreement in interstate commerce. This stay is required, among other reasons, by the Federal Arbitration Act, and because failure to do so would violate the Commerce Clause, the Supremacy Clause, and the Due Process Clauses of the U. S. Constitution.

WHEREFORE, GAC prays this Court to set a prompt hearing on this Motion and, in the interim, to stay all proceedings herein.

RODEY, DICKASON, SLOAN, AKIN
& ROBB, P.A.

By /s/ James Robb

MONTGOMERY, ANDREWS & HANNAHS

By /s/ Seth D. Montgomery

HOWREY & SIMON

By /s/ John Bodner, Jr.
Attorneys for Defendant
General Atomic Company

CERTIFICATE OF SERVICE

I hereby certify that I caused to be either hand-delivered or mailed a true and correct copy of the foregoing Motion for a Stay of Proceedings to all counsel of record on this 3d day of November, 1977.

/s/ Seth D. Montgomery

ATTACHMENT "A"

AMERICAN ARBITRATION ASSOCIATION

Commercial Arbitration Rules
Demand for Arbitration

TO: United Nuclear Corporation
UNC Crescent Plaza
7700 Leesburg Pike
Falls Church, Virginia 22043

General Atomic Company ("GAC"), the Claimant hereunder, a California partnership, the partners in which are Gulf Oil Corporation ("Gulf") and Scallop Nuclear Inc., is the assignee of a written agreement dated June 30, 1973 ("Uranium Supply Agreement"), involving interstate commerce, among United Nuclear Corporation ("UNC") Gulf, and Gulf United Nuclear Fuels Corporation. The Uranium Supply Agreement contains an Arbitration Agreement and the Claimant hereby demands arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. Sec. 1, *et seq.* The Uranium Supply Agreement is attached hereto and incorporated herein as Exhibit "A". The Arbitration Agreement is Article XVII thereof.

Nature of Dispute

The dispute arises out of the Uranium Supply Agreement between UNC and Gulf and various related documents, all of which were assigned to GAC, a partnership. The nature of the dispute is that UNC has challenged the validity and enforceability of the Uranium Supply Agreement in an action brought against GAC in the District Court of the First Judicial District of the State of New Mexico, County of Santa Fe, Cause No. 50827. GAC claims that that agreement is valid and enforceable

in accordance with its terms. GAC has been precluded from filing this demand for arbitration until now by an injunction from the Santa Fe District Court which was recently held unlawful by the United States Supreme Court.

Claim or Relief Sought

Claimant seeks specific performances of the Uranium Supply Agreement in accordance with the terms and provisions thereof, including delivery or uranium concentrates thereunder, and damages and costs; alternatively. Claimant seeks damages for anticipatory and actual breach of contract. The amounts of the requested damages cannot be determined with specificity at this time. In addition, Claimant seeks punitive damages for willful and malicious breach of contract.

Claimant demands arbitration of all issues arbitrable under Article XVII of Exhibit "A", including those pending in the Santa Fe District Court action, except to the extent described below. Under the Uranium Supply Agreement, UNC's obligations to GAC are measured in part by the extent of GAC's obligations to certain utilities (the "Utility Issues").

1. Utility Issues included in the scope of this arbitration demand are:

(a) those issues now pending or hereafter arising in *Duke Power Company* v. *GAC*, Case No. 31-10-0009-78, in Charlotte, N.C., unless and to the extent that UNC is required to arbitrate those issues with GAC in that proceeding, or is bound by the results thereof all as GAC contends;

(b) those issues now pending or hereafter arising in *Commonwealth Edison Company* v. *UNC, GAC and Gulf*, Arbitration Case No. 51-10-0106-74-C, in Chicago, Illinois, unless and to the extent that UNC

is required to arbitrate those issues with GAC in that proceeding, or is bound by the results thereof all as GAC contends.

2. Utility Issues excluded from the scope of this arbitration demand are those issues relating to GAC's obligations (if any) to Detroit Edison Company and Indiana & Michigan Electric Company under certain agreements with those utilities.

It is GAC's desire that to the extent possible any disputes between GAC and UNC regarding the meaning of the utility contracts or GAC's obligation under those utility contracts be resolved in appropriate forums where the representative utility, GAC and UNC are all present.

WHEREFORE, the Claimant requests the following relief:

A. That the American Arbitration Association immediately accept this arbitration under its Commercial Arbitration Rules and conduct proceedings in accordance therewith.

B. Specific performance from UNC of the Uranium Supply Agreement in accordance with its terms, together with damages and costs, or alternatively, compensatory damages and punitive damages in an amount to be set by the arbitrators.

Hearing Locale Requested

It is requested that all hearings to be held in connection herewith shall be in San Diego, California. As less desirable alternatives to San Diego, it is requested that hearings be held in New York City or Chicago.

YOU ARE HEREBY NOTIFIED that copies of the Arbitration Agreement and of this demand are being filed with the American Arbitration Association at its

San Diego, California, Regional Office, with the request that it commence the administration of the arbitration. Under Section 7 of the Commercial Arbitration Rules, you may file an answering statement within seven days after notice from the Administrator.

Dated this 29th day of November, 1977.

GENERAL ATOMIC COMPANY

By /s/ Rudi M. Brewster
GRAY, CARY, AMES & FRYE
2100 Union Bank Building
San Diego, California 92101
(714) 236-1661

EXHIBIT "A"

THIS AGREEMENT made as of the 30th day of June 1973, by and between Gulf Oil Corporation, acting through Gulf Energy & Environmental Systems Company, a division of Gulf Oil Corporation, a Pennsylvania corporation (hereinafter called "Gulf"), United Nuclear Corporation, a Delaware corporation (hereinafter called "UNC"), and Gulf United Nuclear Fuels Corporation, a Delaware corporation (hereinafter called the "Corporation").

WITNESSETH:

In consideration of the mutual covenants herein contained the parties hereto agree as follows:

ARTICLE I

CERTAIN DEFINITIONS

As used herein, the following terms shall have the meanings given below unless, in any particular instance, the context expressly indicates otherwise.

1. *Concentrates* shall mean natural uranium mill concentrates containing the element uranium (U), expressed as and calculated by reference to U_3O_8.
2. *Conversion Facility* shall mean that facility which is to perform the conversion of the concentrates to UF_6.

To avoid burdening the Court file, only the first page of the 1973 Uranium Supply Agreement is attached to this Motion for a Stay of Proceedings although the entire document was attached to the Demand for Arbitration. This document is before the Court in numerous places. It is Exhibit T-37.

AMERICAN ARBITRATION ASSOCIATION

Commercial Arbitration Rules

Designation of Arbitrator

TO: United Nuclear Corporation
UNC Crescent Plaza
7700 Leesburg Pike
Falls Church, Virginia 22043

In accordance with the Arbitration Agreement (Article XVII of Exhibit A of the Demand for Arbitration filed herewith), General Atomic Company designates Dewitt A. Higgs, 1800 Home Tower, 707 Broadway, San Diego, California 92112, as its party-appointed arbitrator.

GENERAL ATOMIC COMPANY

By /s/ Rudi M. Brewster
GRAY, CARY, AMES & FRYE
2100 Union Bank Building
San Diego, California 92101
(714) 236-1661

APPENDIX J

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Supreme Court No. 11775

Dist. Ct. No. 50827

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,

vs.

GENERAL ATOMIC COMPANY, a partnership composed of GULF OIL CORPORATION and SCALLOP NUCLEAR, INC.,
Defendant-Appellant,

INDIANA AND MICHIGAN ELECTRIC COMPANY, and THE DETROIT EDISON COMPANY,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, SANTA FE COUNTY, NEW MEXICO

HONORABLE EDWIN L. FELTER, DISTRICT JUDGE

MOTION FOR EXPEDITED SCHEDULE, A STAY OF PROCEEDINGS BELOW, AND OTHER RELIEF

Defendant-Appellant General Atomic Company (GAC) moves for an expedited schedule for this appeal. The essence of this appeal is two-fold. First, GAC contends that the Court below erroneously failed to stay its proceedings on issues with respect to which GAC demanded arbitration under the Federal Arbitration Act, which issues comprise the greater part of the proceedings currently being litigated in that Court. Secondly, GAC con-

tends that the Court below erroneously stayed arbitrations under the Federal Arbitration Act commenced by GAC in other states, which stays are equivalent to a reinstitution of the previous illegal injunction issued below, in violation of GAC's rights under that Act and the prior United States Supreme Court decision in this case.

An expedited schedule is warranted because the issues raised by this appeal have been fully briefed below, and because the underlying facts are substantially uncontested. In addition, if this appeal is well-taken, it will materially affect the trial of the case which is currently proceeding in the First Judicial District by removing from it, and referring to arbitration, a significant number of the issues now being heard. Finally, the decision below is presently interfering with GAC's rights to have the arbitrations previously demanded in other jurisdictions proceed. The delay of those proceedings while the action below proceeds to a conclusion raises procedural and substantive barriers to GAC's efforts to effectuate its federally guaranteed rights.

GAC suggests that the Court establish the following schedule pursuant to Rule 9(b) of the Rules of Appellate Procedure:

a) Record on appeal to be filed five days after counter-designation of record,

b) Simultaneous briefs-in-chief to be filed ten days thereafter,

c) Simultaneous reply briefs to be filed five days thereafter,

d) Oral Argument to be set as soon as possible after filing of reply briefs, and no later than February 10, 1978,

e) All documents filed in this matter are to be hand-delivered to all opposing counsel in Santa Fe on the day of filing.

GAC further moves that this Court stay the trial of this case in the Court below during the pendency of this appeal on the following grounds:

(1) A stay will enable all counsel to devote full attention to this appeal;

(2) A stay will enable the originals of such exhibits of other portions of the record as may be counter-designated to be sent to this Court without the necessity of copying;

(3) A stay will avoid the enormous expense and inconvenience to all parties of presentation of evidence on issues which will be removed from this case if the Court concurs with GAC's position that it is entitled to arbitration of these issues;

(4) A stay will to some extent mitigate the effect of the advantage obtained by UNC's previous obtaining of the illegal injunction against GAC's initiating arbitration proceedings elsewhere, and UNC's continuing advantage arising from the order below, challenged on this appeal, which stayed those arbitrations as soon as they were commenced.

General Atomic further moves that filing of only one copy of the record on appeal and exhibits be required.

RODEY, DICKASON, SLOAN, AKIN
& ROBB, P.A.

By /s/ Richard C. Ginzner

MONTGOMERY, ANDREWS & HANNAHS

By /s/ Seth D. Montgomery
Attorneys for
General Atomic Company

CERTIFICATE OF SERVICE

It is hereby certified that I either hand-delivered or mailed a true and correct copy of the foregoing Motion to all counsel of record on this 5th day of January, 1978.

/s/ Seth D. Montgomery

Supreme Court, U. S.
FILED
APR 17 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1237

GENERAL ATOMIC COMPANY,
Petitioner,

v.

EDWIN L. FELTER, ETC., ET AL.,
Respondents.

On Motion for Leave to File Petition for Writ of Mandamus and Petition for Writ of Mandamus to the District Court for the First Judicial District, Santa Fe County, New Mexico

---

BRIEF FOR RESPONDENT UNITED NUCLEAR CORPORATION IN OPPOSITION

RICHARD T. CONWAY
JOHN TOWNSEND RICH
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April 17, 1978

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Statutes and Rules:

Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*	*passim*
28 U.S.C. § 1257	12
28 U.S.C. § 1651	2, 11
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New Mexico Rules of Civil Procedure, Rule 54(b)	10

Miscellaneous:

Loevinger, *Antitrust Issues as Subjects of Arbitration*, 44 N.Y.U. L. Rev. 1085 (1969)	22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1237

GENERAL ATOMIC COMPANY,
Petitioner,

v.

EDWIN L. FELTER, ETC., ET AL.,
Respondents.

On Motion for Leave to File Petition for Writ of Mandamus and Petition for Writ of Mandamus to the District Court for the First Judicial District, Santa Fe County, New Mexico

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BRIEF FOR RESPONDENT UNITED NUCLEAR CORPORATION IN OPPOSITION

OPINIONS BELOW

The December 16 and 27, 1977 decisions and partial final judgments of the District Court, Santa Fe County, New Mexico, appear at Pet. App. 1a-21a. The January 4, 1978 order of the New Mexico Court of Appeals certifying appeal of those judgments to the New Mexico Supreme Court appears at Pet. App. 30a. The January 13, 1978

order of the New Mexico Supreme Court accepting the certification and denying a stay of trial pending appeal appears at Pet. App. 22a. The February 1, 1978 order of the New Mexico Supreme Court again denying a stay of the trial appears at Pet. App. 23a-24a. The February 22, 1978 order of the New Mexico Supreme Court expediting the certified appeal appears at App. A, *infra*. None of the foregoing decisions and orders is reported.

JURISDICTION

The partial final judgments of the District Court, Santa Fe County, New Mexico, were issued on December 16 and 27, 1977. The motion for leave to file the petition for a writ of mandamus and the petition were filed on March 3, 1978. This Court's jurisdiction is invoked by petitioner under 28 U.S.C. § 1651.

QUESTIONS PRESENTED

1. Whether this Court should entertain a petition for mandamus when the lower state court orders sought to be reviewed are pending on expedited appeal to the State Supreme Court.

2. Whether the orders of the State District Court violate the mandate of this Court in *General Atomic Company* v. *Felter*, No. 76-1640. decided October 31, 1977.

STATEMENT

1. Petitioner General Atomic Company ("GAC"), a partnership of Gulf Oil Corporation and Scallop Nuclear, Inc., is a party to several contracts for the supply of uranium to various utility companies (Pet. 4-5).[1] In 1973,

[1] Those contracts were assigned to GAC by Gulf. Gulf had acquired them in the form of contracts and letters of intent as part of its purchase of United Nuclear's interest in Gulf United Nuclear Fuels Corporation, a Gulf-United Nuclear joint venture corporation.

respondent United Nuclear Corporation ("UNC")[2] entered into a complex agreement with Gulf that provided, *inter alia*, for UNC to supply uranium to Gulf. Gulf subsequently assigned the contract to GAC. In December 1975, UNC brought an action against GAC in the District Court, Santa Fe County, New Mexico to invalidate that supply contract on the grounds, among others, of common law fraud and violations of New Mexico antitrust laws.[3] In April 1976, UNC amended its complaint to include a challenge, on the same grounds, to a 1974 contract with GAC that does not contain an arbitration clause.

On January 19, 1976, GAC filed an interpleader action against UNC and the utility companies in the United States District Court for the District of New Mexico (Pet. App. 3a).[4] On January 23, 1976, Gulf filed a complaint in the same court against UNC alone, seeking a determination of the validity and construction of a UNC release that Gulf alleged related to the 1973 supply agreement.[5]

[2] United Nuclear is a respondent pursuant to Rule 31 of the Rules of this Court.

[3] GAC has on several occasions placed matters arising out of this litigation before this Court. It successfully sought certiorari last term in respect of a District Court order enjoining it from instituting *in personam* actions against UNC relating to the subject matter of the state suit (*General Atomic Company* v. *Felter*, 429 U.S. 973 (1976); *id.*, No. 76-1640, decided October 31, 1977 (discussed *infra*)); it recently moved unsuccessfully to stay further proceedings in the trial court (*id.*, A-747, decided March 20, 1978); and there are currently pending before the Court, in addition to the instant motion and petition, two petitions for writs of certiorari seeking review of various District Court and New Mexico Supreme Court orders (*id.*, Nos. 77-1236 and 77-1269), to which we are today responding in a separate brief in opposition.

[4] That action was dismissed for want of jurisdiction on March 2, 1976, and the court of appeals affirmed. *General Atomic Co.* v. *Duke Power Co.*, 553 F.2d 53 (10th Cir. 1977).

[5] Gulf's complaint was dismissed on September 29, 1976, on the ground that the issue presented could be determined in the state court litigation. *Gulf Oil Corp.* v. *United Nuclear Corp.*, No. 73-032-B.

On February 17, 1976, one of the utilities, Duke Power Company ("Duke"), instituted arbitration proceedings in North Carolina against GAC under the Duke-GAC contract. On February 24, 1976, Indiana & Michigan Electric Company ("I&M") brought an action against GAC in the United States District Court for the Southern District of New York, seeking damages and specific performance of the I&M-GAC contract. In March 1976, Commonwealth Edison Company ("Commonwealth") instituted arbitration proceedings in Illinois against GAC, Gulf, and UNC under the Commonwealth (Lasalle)-GAC contract.

On April 2, 1976, Judge Felter of the New Mexico District Court, in order to forestall "vexatious and harrassing and * * * multiplicitous litigation,"[6] enjoined GAC from filing or prosecuting, other than in the district court itself, any original, third-party, or arbitration actions against UNC relating to the subject matter of UNC's suit.[7] The New Mexico Supreme Court granted an alternative writ of prohibition on April 14, 1977, staying enforcement of the injunction, but on June 16, 1977, after briefing and oral argument, that court dismissed the writ as improvidently granted.

On November 29, 1976, this Court granted GAC's petition for a writ of certiorari, vacated the judgment of the

[6] Order of April 2, 1976, *United Nuclear Corp.* v. *General Atomic Co.*, District Court of the First Judicial District, County of Santa Fe, State of New Mexico.

[7] The order expressly excepted filings or proceedings in the Santa Fe District Court from the reach of the injunction, and in open court before the order was entered Judge Felter assured counsel for GAC that GAC remained free to demand arbitration with UNC and to seek to compel arbitration in that forum. See pp. 7-8 of the Transcript of Proceedings, April 2, 1976, attached hereto as Appendix B. GAC has subsequently acknowledged that it had fully understood that it was free at any time, notwithstanding the injunction, to demand arbitration in New Mexico (see *infra*, p. 22 n.26).

New Mexico Supreme Court, and remanded to that court to consider whether its judgment was based on state or federal grounds.[8] On February 21, 1977, the New Mexico Supreme Court ruled that its judgment rested on federal grounds,[9] and on October 31, 1977, this Court again granted certiorari and summarily reversed, holding that under *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964), the State District Court was without power to enjoin GAC from initiating further actions in federal courts or invoking federal rights on the ground that such actions might be vexatious or harassing. *General Atomic Company* v. *Felter*, No. 76-1640, decided October 31, 1977.

In the meantime, I&M's suit aginst GAC in the Southern District of New York had been dismissed,[10] and at GAC's request I&M had been added as a party defendant to the Santa Fe action. The Detroit Edison Company ("Detroit Edison") had brought a complaint against GAC in Michigan state court, but that action also had been dismissed and Detroit Edison, like I&M, had been added to the Santa Fe litigation at GAC's behest. Detroit Edison is no longer a party in that case, however, having settled its differences with GAC on March 18, 1978. GAC had brought an unsuccessful action in the United States District Court for the District of North Carolina seeking to enjoin the arbitration demanded by Duke;[11] on December 14, 1977, that arbitration proceeding was settled. Upon complaint by Commonwealth, the federal courts in Illinois had ordered that the arbitration it had commenced against

[8] *General Atomic Co.* v. *Felter*, 429 U.S. 973 (1976).

[9] *General Atomic Co.* v. *Felter*, 560 P.2d 541 (1977).

[10] *Indiana & Michigan Electric Co.* v. *General Atomic Co.*, No. 76 Civ. 881 (S.D.N.Y. Jan. 5, 1977).

[11] *General Atomic Co.* v. *Duke Power Co.*, 420 F. Supp. 215 (W.D. N.C. 1976).

GAC, Gulf, and UNC should proceed.[12] Thus, the Duke-GAC and Detroit Edison-GAC disputes have been settled, the Commonwealth arbitration proceeding is now in progress, and I&M is a party in the New Mexico state court litigation.

2. GAC filed its answer to UNC's complaint on May 6, 1976. In its eighth affirmative defense it stated that it was "currently opposing arbitration with both Commonwealth Edison and Duke"; it alleged that UNC is bound by the arbitration provisions of the Duke-GAC and the Commonwealth-GAC contracts and that UNC's obligations to GAC "may be affected by the resolution of the issues with respect to which Duke and Commonwealth Edison have demanded and may demand arbitration"; and it demanded arbitration "of *only* those issues which [GAC] is ultimately required to arbitrate with Duke and Commonwealth Edison pursuant to the above contracts, and which also can be arbitrated jointly among" UNC, GAC, and the respective utility (emphasis added). GAC "[*s*]*pecifically excluded from the scope of this arbitration demand * * * all other arbitrable issues, including any concerning the validity and enforceability of* [*the 1973 UNC-GAC supply agreement*]" (emphasis added).

On November 28, 1977, following the issuance of this Court's mandate to the New Mexico Supreme Court and that court's direction to the District Court,[13] Judge Felter

[12] *Commonwealth Edison Co.* v. *Gulf Oil Corp.*, 400 F. Supp. 888 (N.D. Ill. 1975), *aff'd*, 541 F.2d 1263 (7th Cir. 1976).

[13] On November 7, 1977, one week after this Court handed down its opinion declaring the April 2 injunction in error, a hearing was held before Judge Felter on GAC's motion to dissolve the injunction immediately. At the conclusion of that hearing, Judge Felter denied the motion, ruling (Tr. 47):

> "* * * I am going to wait for the mandate. When the mandate comes down, why, I certainly intend to obey it. I am not clear as to just what the mandate is going to embrace. I am assuming that [the Supreme Court] opinion merely held that state courts cannot enjoin a litigant from filing in personam actions in federal court, which would include arbitration proceedings that may come under federal rights. But certainly it would not touch the Court's injunction insofar as it relates to filing cases in state courts that do not come under federal arbitration proceedings."

On November 10, 1977, GAC requested this Court to issue its mandate forthwith, and the mandate was issued on November 14, 1977.

entered an order (Pet. App. 27a) amending the April 2 injunction "to exclude from its terms and conditions all in personam actions in Federal Courts and all other matters mandated to be excluded from the operation of said preliminary injunction" by this Court's decision. GAC made no objection to this conforming order.

Two days later GAC moved to stay further proceedings in the District Court and announced that it was contemporaneously (1) instituting an arbitration action against UNC in North Carolina and seeking to consolidate that action with the then-ongoing Duke arbitration, (2) instituting a cross-claim against UNC in the Commonwealth arbitration in Chicago, and (3) initiating a new arbitration proceeding against UNC alone in San Diego relating to the validity and enforceability of the 1973 supply agreement "and all other arbitrable issues pending in" the District Court.[14] UNC opposed that motion and cross-moved for an order staying arbitration and for entry of a partial final judgment.

3. On December 16, 1977, the District Court granted UNC's motion to stay arbitration. In its decision accompanying that judgment, the court made these findings of fact, among others (Pet. App. 1a-7a):

> (a) that GAC has known at all material times during the course of the litigation that the 1973 supply agreement gave it a right to demand arbitration

[14] GAC's November 30, 1977 Motion for a Stay of Proceedings, p. 1.

against UNC, yet never demanded arbitration nor petitioned the court to stay the proceedings pending arbitration of any of the issues between the parties arising out of that agreement (Findings Nos. 4, 12, and 27);

(b) that the April 2, 1976 injunction did not prohibit GAC from demanding arbitration with UNC in the Santa Fe District Court (Finding No. 13);

(c) that in its answer to the UNC complaint, filed May 6, 1976, GAC specifically excluded from the scope of its arbitration demand all arbitrable issues concerning the validity and enforceability of the 1973 supply agreement (Finding No. 10);

(d) that the Duke-GAC and Commonwealth-GAC contracts contain no provisions for arbitration between GAC and UNC (Finding No. 14);

(e) that GAC on numerous occasions sought judicial determination of the rights and responsibilities of the parties under the 1973 supply agreement, *e.g.*, in its complaint in statutory interpleader filed on January 16, 1976 in the United States District Court for the District of New Mexico; in its counterclaim against UNC filed on May 6, 1976 as part of its answer to UNC's complaint; and in its motion for summary judgment filed September 9, 1977, seeking a determination that the 1973 agreement was valid and enforceable (Findings Nos. 7, 9 and 18);[15]

(f) that GAC drafted the portion of the August 22, 1977 Pretrial Order relating to its claims against UNC and did not state arbitration as a defense to the claims arising under the 1973 supply agreement or indicate a desire to resolve those issues by arbitration rather than litigation (Finding No. 17);

[15] GAC's motion for summary judgment was denied by the District Court on October 27, 1977.

(g) that pursuant to its defenses and counterclaims, GAC has engaged in extensive discovery, taking more than 100 depositions totaling more than 16,000 pages of testimony and involving 2,785 exhibits, has copied more than 500,000 pages of documents supplied by UNC pursuant to GAC discovery requests, and has propounded and received answers to two voluminous sets of interrogatories served on UNC (Finding No. 16);

(h) that UNC has made enormous expenditures of time, effort, and money in preparing its case for trial on the merits and in complying with GAC's extensive discovery demands, and that as a result of those demands GAC has acquired huge amounts of information from UNC that would not otherwise be available to it (Finding Nos. 24 and 25);

(i) that GAC filed numerous motions for extensions of time, representing to the court that the extensions were necessary to GAC's proper preparation for trial (Finding No. 21);

(j) that trial commenced on October 31, 1977, and had continued for more than one month (Finding No. 19); and

(k) that all of the issues raised in the complaint and GAC's counterclaim are inextricably intertwined with the antitrust issues raised by both parties (Finding No. 11).

Based on these findings, the District Court ruled (Pet. App. 8a) that GAC had waived any rights it may have had to arbitrate issues arising under the 1973 supply agreement with UNC, and that the Duke and Commonwealth contracts with GAC gave GAC no rights to demand arbitration with UNC. In addition, the court ruled (*ibid.*) that the state antitrust issues raised by both parties could not be submitted to arbitration, and that those issues so permeated the case that none of the issues in the case could properly be submitted to arbitration.

Accordingly, the court stayed the arbitration proceedings filed by GAC against UNC—with the caveat, however, that GAC remained free to assert any federal rights in appropriate judicial proceedings (*ibid.*).

On December 27, 1977, the District Court issued a virtually identical decision and order (Pet. App. 11a-19a), formally denying GAC's motion for a stay of trial as well as granting UNC's motion for a stay of arbitration. With respect to both the December 16 and the December 27 orders, the District Court also issued final partial judgments under Rule 54(b) of the New Mexico Rules of Civil Procedure (analogous to Rule 54 of the Federal Civil Rules) (Pet. App. 9a, 20a). GAC noticed its appeal from those orders, whereupon UNC moved in the Court of Appeals to certify the appeal directly to the New Mexico Supreme Court. On January 4, 1978, the Court of Appeals did certify the case to the Supreme Court, and on February 27, 1978, that court granted GAC's motion for expedited appeal (App. A, *infra*). As of this writing, all briefs have been filed and oral argument is scheduled before the New Mexico Supreme Court for May 2, 1978.[16]

ARGUMENT

This case does not call for the "drastic and extraordinary remed[y]" (*Ex Parte Fahey*, 332 U.S. 258, 259 (1947)) of mandamus. The District Court orders that GAC seeks reviewed are now *sub judice* in the New Mexico Supreme Court on expedited appeal, and there is no occasion for this Court to interrupt the ongoing state court appellate process. Beyond that, the District Court acted well within its jurisdiction in entering its orders—which adjudicated matters outside the compass of this

[16] On April 4, 1978, the District Court entered a declaratory judgment resolving all issues other than damages in UNC's favor, pursuant to an earlier sanctions order and default judgment. See our brief in opposition to GAC's petitions in Nos. 77-1236 and 77-1269.

Court's mandate in *General Atomic Co.* v. *Felter*, *supra*—and for that reason as well mandamus will not lie. *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939). Finally, the District Court decision was correct, with the result that, even if this case were otherwise suitable to review upon extraordinary writ, issuance of a mandamus would be unwarranted.

1. The peremptory writ of mandamus, like the other common law writs authorized under 28 U.S.C. § 1651, is a "drastic and extraordinary" remedy (*Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 384 (1953)) that is "reserved for really extraordinary cases" (*Ex Parte Fahey*, 332 U.S. 258, 259 (1947)). The Court's power to issue the writ "is sparingly exercised" (*Parr* v. *United States*, 351 U.S. 513, 520 (1956)), and then only in "exceptional circumstances amounting to a judicial 'usurpation of power'" (*Will* v. *United States*, 389 U.S. 90, 95 (1967), quoting from *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212, 217 (1945)).

Given the extraordinary nature of the writ, the party seeking mandamus has the burden of showing that its right to issuance of the writ is "clear and indisputable." *Will* v. *United States*, *supra*, 389 U.S. at 96; *Bankers Life & Cas. Co.* v. *Holland*, *supra*, 346 U.S. at 384; *United States* v. *Duell*, 172 U.S. 576, 582 (1899). In particular, since "the extraordinary writs cannot be used as substitutes for appeal" (*Bankers Life*, *supra*, 346 U.S. at 383), and since "whatever may be done without the writ may not be done with it" (*ibid.*), the party seeking a writ of mandamus is required by Rule 31(3) of the Rules of this Court to "set forth with particularity why the relief sought is not available in any other court."

Petitioner has failed to make and could not make such a showing, for the orders that petitioner seeks to have reviewed by mandamus from this Court are currently

pending on petitioner's expedited appeal before the New Mexico Supreme Court. The issues raised on that appeal —which appeal has been fully briefed and awaits only oral argument—include the issues raised here, and accordingly petitioner cannot say that "the relief sought is not available in any other court."

Should the District Court orders be reversed by the New Mexico Court, petitioner's claims in this Court will become moot. Should they be affirmed, petitioner may seek review of the State Supreme Court's judgment by way of a petition for a writ of certiorari pursuant to 28 U.S.C. § 1257. In either event, there is no need for this Court to interfere at this stage with the normal process of appellate review.

Our position is strengthened by the respect that this Court has ruled must be afforded state tribunals in similar situations. Indeed, we know of no case, and petitioner cites none, in which this Court has issued a writ of mandamus directly to a state trial court, thereby bypassing the state appellate courts. In *In re Blake and Others*, 175 U.S. 114, 118 (1899), where the petitioner sought relief from an alleged error in the State Supreme Court's construction of a mandate from this Court, it was held that the proper remedy was "by writ of error and not by mandamus. The remedy on error is not only entirely adequate * * * but in respect of dealing with state tribunals is manifestly the proper remedy. * * * [T]he summary character of the proceeding by mandamus renders it inappropriate in respect of the courts of another jurisdiction." [17] This decision indicates that the

[17] Petitioner's reliance (Pet. 3, 15) on *Deen* v. *Hickman*, 358 U.S. 57 (1958), is in our view misplaced. While that decision, unlike *In Re Blake and Others*, *supra*, did not insist that a challenge to a State Supreme Court's construction of a mandate from this Court be brought here by way of certiorari under 28 U.S.C. § 1257 rather than mandamus, it nevertheless illustrated—by the refusal actually to issue the writ—this Court's reluctance to rely upon a peremptory

Court is chary of resorting to the extraordinary writs where to do so would needlessly interfere with the process of the state courts. Cf. *Juidice* v. *Vail*, 430 U.S. 327, 334 (1977); *Huffman* v. *Pursue*, 420 U.S. 592, 601 (1975).

These principles of restraint apply with special force here, where the state court appellate process is in full swing and all three tiers of the state judicial system (the District Court by entering final partial judgments, the Court of Appeals by certifying petitioner's appeal, and the State Supreme Court by accepting the certification and expediting the appeal) have evidenced their concern that the issues raised here be settled promptly.

In sum, petitioner has available other remedies than the writ of mandamus, and accordingly the decisions and the Rules of this Court—and considerations of federalism and comity—dictate that petitioner's motion be denied.[18]

2. Mandamus is also unavailable in this case because the District Court acted within its jurisdiction in entering

writ directed to a state court. More importantly, *Deen* dealt with a motion for leave to file a petition for a writ of mandamus directed to the State Supreme Court: there were no further remedies available in the state court system. Here, by contrast, petitioner has further remedies available to it in the New Mexico Supreme Court and is actively pursuing those remedies.

[18] Petitioner argues (Pet. 14) that mandamus is appropriate immediately, without regard to the pending state court appellate review process, because of the expense of the ongoing trial and because, if that trial concludes before any GAC-initiated arbitration commences, the effect of any findings by Judge Felter upon such arbitration "cannot be fully anticipated." It is well-settled, however, that an extraordinary writ is "not to be used as a substitute for appeal * * *, even though hardship may result from delay and perhaps unnecessary trial * * *." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110 (1964). Accord, *Bankers Life*, *supra*, 346 U.S. at 383; *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 202-203 (1945); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 30-31 (1943). In any event, that trial has been in progress since October 31, 1977. Declaratory judgment has been entered and the trial is nearing completion on the only issue—damages—that remains.

the December 16 and 27 orders. Those orders adjudicated issues not presented to or passed upon by this Court in *General Atomic Co* v. *Felter, supra*, and therefore they cannot be said to be inconsistent with the mandate in that case. "The inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court * * *." *Ex Parte Union Steamboat Co.*, 178 U.S. 317, 319 (1900). See also *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 168 (1939); *Ex Parte Century Indemnity Co.*, 305 U.S. 354 (1938); *In re Potts*, 166 U.S. 263, 265-266 (1897); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-256 (1895).

The April 2, 1976 injunction against petitioner that this Court subsequently held in error was entered by the District Court and affirmed by the New Mexico Supreme Court on the grounds that the District Court possessed equity jurisdiction to enjoin GAC from instituting further actions against UNC in federal as well as state forums concerning the subject matter of UNC's suit against GAC when such actions would be "vexatious" and "harassing." [19] When the case came before this Court the dispositive question was whether the state courts' view was consistent with this Court's construction of the Supremacy Clause in *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964).

In that case this Court held invalid a state court injunction against the commencement or prosecution of federal court suits by plaintiffs who had suffered adverse rulings in state court on the very issues they sought to litigate anew in the federal courts. The New Mexico Supreme Court had distinguished *Donovan* on the ground that it was not applicable to federal court litiga-

[19] See *General Atomic Co.* v. *Felter, supra*, slip op. 5-6.

tion that was prospective rather than pending and that would be brought for "the purpose of harassment" (*General Atomic Co.* v. *Felter, supra*, slip op. 5). This Court ruled, however, that *Donovan* makes clear "that the rights conferred by Congress to bring *in personam* actions in federal courts are not subject to abridgment by state-court injunctions, regardless of whether the federal litigation is pending or prospective" (*ibid.*), and that "[f]ederal courts are fully capable of preventing their misuse for purposes of harassment" (*id.* at 7).

The Court also noted (*id.* at 5-6 & n.11) that the April 2 injunction was overbroad insofar as it restrained petitioner from attempting to invoke rights under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* It did not, however, consider or pass upon the question whether petitioner in fact had any such arbitration rights. Rather, it stated that petitioner "has every right *to attempt to*" implead UNC in the pending arbitration proceedings brought by Duke and Commonwealth, and that "[t]he right *to pursue* federal remedies * * * may no more be restricted by a state court here than in *Donovan*" (*id.* at 7; emphasis added).

By contrast, the December 16 and 27, 1977 orders that petitioner now challenges did not restrict, but explicitly excepted from their scope, petitioner's right to seek federal court adjudication of its claims. The orders denied petitioner's motion to stay the judicial proceeding pending arbitration of issues going to the validity or enforceability of the 1973 supply agreement on the grounds, among others, (1) that petitioner had waived its right to arbitrate those issues, both by specifically disavowing any intent to arbitrate them in its eighth affirmative defense to UNC's complaint and by its consistent course of conduct, before and after the effective date of the injunction, displaying an intent to litigate rather than arbitrate those issues, and (2) that, in

any event, the antitrust issues raised by both parties were so intertwined with any arbitrable issues that none of the latter could be submitted to arbitration. In view of those rulings, and the finding that the GAC-Duke and GAC-Commonwealth contracts give petitioner no right to arbitrate with UNC, the December 1977 orders also stayed petitioner from pursuing arbitration of issues between GAC and UNC either in the pending arbitration proceedings between GAC and those utilities or in separate arbitration proceedings.

Neither the issue of waiver, nor of the effect of the antitrust issues, nor of the proper construction of the GAC-Duke and GAC-Commonwealth contracts, was presented to or passed upon by this Court in *General Atomic Co.* v. *Felter*.[20] Moreover, the December 1977 orders expressly provided that they would not "operate to preclude [petitioner] from asserting claimed federal rights in appropriate proceedings" (Pet. 9a-10a), thereby protecting any rights of petitioner to institute federal judicial proceedings regarding arbitration.

In short, the December 16 and 27 orders do not, contrary to petitioner's assertion (Pet. 4), deny petitioner

[20] Thus petitioner is incorrect in stating (Pet. 14) that the waiver issues now decided by the District Court "were before this Court on its consideration of GAC's [previous] petition for a writ of certiorari" and (Pet. 13) have "already been rejected by this Court." Petitioner is also incorrect in stating (Pet. 9) that in the District Court UNC opposed the request for arbitration "for substantially the same reasons set out in its prior Brief in Opposition in this Court." In its brief in opposition in No. 76-1640, UNC argued (Br. 6-11) that in the New Mexico Supreme Court petitioner had not argued the issue of the April 2 injunction's validity insofar as it enjoined arbitration, and that petitioner had therefore waived its right to present argument on that issue to this Court. UNC did not argue that—and this Court did not consider whether—petitioner had waived its right to arbitrate. Moreover, petitioner does not even suggest that the other reasons for the holding in the December 1977 orders that arbitration is inappropriate were before this Court in the earlier proceeding.

"a right previously confirmed by this Court." Rather, the grounds relied upon by the District Court in support of those orders were "not dealt with in its former ruling and [were] not presented by the [former] petition for certiorari," *Ex Parte Century Indemnity Co.*, *supra*, 305 U.S. at 355. Therefore mandamus to review those orders will not lie.

3. Since petitioner has not shown that the relief it seeks is unavailable in any other court or that the December 16 and 27 orders of the District Court violate this Court's mandate, there is no occasion for the Court to consider petitioner's challenge to the merits of those orders. See *Bankers Life*, *supra*, 346 U.S. at 382; *Ex Parte Roe*, 234 U.S. 70, 73 (1914). Nor is there any other reason why this Court should review those orders, which are based largely on factual circumstances unique to this case. Out of an abundance of caution, however, we now show, briefly, that the District Court's rulings were correct.

Petitioner refers (Pet. 12, 13) to the District Court's "'waiver' theory" as if it were unauthorized and unprecedented. Quite the reverse is true. Petitioner's motion in the District Court to stay the trial pending arbitration invoked the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* Section 3 of that Act provides (emphasis added):

> "If any suit * * * be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which the suit is pending, upon being satisfied that the issue involved in such suit * * * is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, *providing the applicant for the*

stay is not in default in proceeding with such arbitration."

If a party has "waived the right to arbitrate, that party is necessarily 'in default in proceeding with such arbitration.'" *Cornell & Co.* v. *Barber & Ross Co.*, 360 F.2d 512, 513 (D.C. Cir. 1966); see also *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 70 F.2d 297, 299 (2d Cir. 1934), *aff'd*, 293 U.S. 449 (1935). The state District Court rightly applied the federal Act to the arbitration controversy,[21] and accordingly, in passing on petitioner's motion for a stay, it was authorized, if not indeed obliged, to determine whether petitioner was "in default in proceeding with such arbitration" by reason of a waiver. In short, the ruling that petitioner was in default was fully within the court's power to enter.[22]

[21] The Federal Arbitration Act itself is not jurisdictional: resort to federal court for enforcement of a federal arbitration right must be predicated upon some independent jurisdictional ground, such as diversity. *E.g.*, *Ballantine Books, Inc.* v. *Capital Distrib. Co.*, 302 F.2d 17, 19 (2d Cir. 1962); see also 9 U.S.C. § 4. That Act, however, creates substantive federal rights, and it must be applied in diversity cases in federal courts notwithstanding inconsistent state law. *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404-405 (1967). If, as here, the arbitration clause appears in a contract involving interstate commerce, then the Act also applies in and must be enforced by the state courts. *E.g.*, *Boston & Maine Corp.* v. *Chicago, Burlington, & Q. R.R. Co.*, 381 F.2d 365, 366 (2d Cir. 1967), *cert. denied*, 390 U.S. 1027 (1968); *Network Cinema Corp.* v. *Glassburn*, 357 F. Supp. 169, 171 (S.D.N.Y. 1973); *West Point-Pepperell, Inc.* v. *Multi-Line Indus., Inc.*, 201 S.E.2d 452, 453 (Ga. 1973); *A/S J. Ludwig Mowinckels Rederi* v. *Dow Chem. Co.*, 307 N.Y.S.2d 660 (1970); *Miller* v. *Puritan Fashions Corp.*, 516 S.W.2d 234 (Tex. Civ. App. 1974); *Pinkis* v. *Network Cinema Corp.*, 9 Wash. App. 377, 512 P.2d 751 (1973); contra, *Pullman, Inc.* v. *Phoenix Steel Corp.*, 304 A.2d 334, 338 (Del. Super. Ct. 1973).

[22] Inasmuch as the court had power to pass upon petitioner's motion to stay the trial pending arbitration, it also possessed the concomitant power in equity to enjoin arbitration upon a determination that the agreement to arbitrate no longer existed. *A.B.C., Inc.* v. *American Fed. of Tel. & Radio Artists*, 412 F. Supp. 1077 (S.D. N.Y. 1976); *Netherlands Curacao Co.* v. *Kenton Corp.*, 366 F. Supp. 744 (S.D.N.Y. 1973); cf. *Leesona Corp.* v. *Cotwool Mfg. Corp.*, 315 F.2d 538 (4th Cir. 1963).

Moreover, in determining petitioner's arbitration rights, the District Court acted entirely within the letter and spirit of the federal Act and the relevant federal court decisions interpreting and applying that Act. Those decisions hold that, where conduct allegedly constituting waiver arises out of participation in judicial proceedings, the question of waiver is for the court, rather than the arbitrator, to decide. See *N & D Fashions, Inc.* v. *DHJ Industries, Inc.*, 548 F.2d 722 (8th Cir. 1977); *Reid Burton Constr., Inc.* v. *Carpenters Dist. Council of Southern Colorado*, 535 F.2d 598 (10th Cir. 1976, *cert. denied*, 429 U.S. 907 (1976); *Cornell & Co.* v. *Barber & Ross Co.*, *supra*; *Weight Watchers of Quebec Ltd.* v. *Weight Watchers International, Inc.*, 398 F. Supp. 1057 (E.D. N.Y. 1975); *Michael* v. *SS Thanasis*, 311 F. Supp. 170 (N.D. Cal. 1970); *Necchi Sewing Machine Sales Corp.* v. *Carl*, 260 F. Supp. 665 (S.D.N.Y. 1966); *In Re Tsakalotos*, 259 F. Supp. 210 (S.D. N.Y. 1966).[23]

The decision whether a party has waived its arbitration rights is essentially a factual one. *Carolina Throwing Co.* v. *S & E Novelty Corp.*, 442 F.2d 329, 330-331 (4th Cir. 1971); *Burton-Dixie Corp.* v. *Timothy McCarthy Constr. Co.*, 436 F.2d 405, 408 (5th Cir. 1971); *Weight Watchers*, *supra*, 398 F. Supp. at 1059; *Michael* v. *SS Thanasis*, *supra*, 311 F. Supp. at 181. The District Court's conclusion that petitioner had waived its rights was based principally on two considerations: petitioner's

[23] This Court's decision in *Operating Engineers* v *Flair Builders, Inc.*, 406 U.S. 487 (1972), is not to the contrary. There it was held that the lower courts, in ruling that they were capable of passing on the defense of laches in a suit to compel arbitration, had misapprehended the scope of the arbitration clause, which left the issue of laches to the arbitrator. *Id.* at 491. Nothing in that decision casts doubt upon the proposition that a party's "conduct before the court" creates an issue of waiver for the court to decide. *Reid Burton Constr., Inc.*, *supra*, 535 F.2d at 604.

explicit waiver, in its eighth affirmative defense, of its desire to arbitrate any issue arising under the 1973 supply agreement, and petitioner's course of conduct demonstrating its desire to litigate rather than arbitrate its dispute with UNC.

In its answer to UNC's complaint, petitioner in its eighth affirmative defense stated that it was "currently opposing arbitration with both Commonwealth Edison and Duke," and that it demanded arbitration "of *only* those issues which [GAC] is ultimately required to arbitrate with Duke and Commonwealth Edison * * * and which can also be arbitrated jointly among UNC, GAC, and the respective utility" (emphasis added). In the next sentence petitioner stated: "Specifically excluded from the scope of this arbitration demand are all other arbitrable issues, including any concerning the validity and enforceability of" the 1973 UNC-GAC supply agreement.

It is difficult to imagine a more explicit waiver of arbitration.[24] Petitioner does not mention this "[s]pecific[] exclu[sion]" in its papers in this Court; nor does it make any effort to show why, in light of this express waiver, the District Court was incorrect in ruling as it did. In our view the eighth affirmative defense, without more, unequivocally supported the District Court's ruling that petitioner had waived its right to arbitrate any issues under the 1973 supply agreement.

The District Court did not, however, rely exclusively on that express waiver. Rather, relying on persuasive

[24] "Submission of part of an arbitrable matter to a court waives the submittor's right to insist upon arbitration of the remainder." *Gutor International Ag.* v. *Raymond Packer Co., Inc.*, 493 F.2d 938, 945 (1st Cir. 1974). For that reason, in addition to the lack of any provision in the Duke-GAC or Commonwealth-GAC contracts providing for arbitration between GAC and UNC, the district court correctly ruled (Pet. App. 9a) that GAC had no right to arbitrate with UNC in the then-pending Duke or the Commonwealth arbitration proceedings.

authorities, it ruled that petitioner had also waived its right to arbitrate by taking the following actions, among others (Pet. App. 1a-7a): (1) by filing two actions against UNC prior to any injunction without demanding arbitration, see, *e.g.*, *Gutor International AG* v. *Raymond Packer Co., Inc.*, 493 F.2d 938 (1st Cir. 1974); *The Belize*, 25 F. Supp. 663 (S.D. N.Y. 1938); *Bolo Corp.* v. *Homes & Son Constr. Co.*, 105 Ariz. 343, 464 P.2d 788 (1970); (2) by filing an answer disclaiming an intent to arbitrate and by filing a counterclaim on the merits, see, *e.g.*, *Cornell & Co., supra*, 360 F.2d at 513; *American Locomotive Co.* v. *Gyro Process Co.*, 185 F.2d 316 (6th Cir. 1950); (3) by waiting until the completion of extensive discovery and by obtaining discovery advantages not available to it in arbitration, see, *e.g.*, *Cornell & Co., supra*, 360 F.2d at 513; *Liggett & Myers, Inc.* v. *Bloomfield*, 380 F. Supp. 1044 (S.D.N.Y. 1974); (4) by filing a motion for summary judgment, see *Weight Watchers, supra*, 398 F. Supp. at 1060; and (5) by generally representing to the trial court and to the parties that it was preparing to participate fully in the trial, see, *e.g.*, *Demsey Assoc.* v. *S.S. Sea Star*, 461 F.2d 1009 (2d Cir. 1972). This course of conduct, especially when considered in addition to petitioner's express waiver, fully justified the District Court's ruling that petitioner had waived its rights under the 1973 supply agreement.[25]

[25] The District Court also correctly ruled (Pet. App. 9a) that the state antitrust issues raised by both parties were not subject to arbitration. It is settled that federal antitrust issues are not arbitrable under the Federal Arbitration Act. *Cobb* v. *Lewis*, 488 F.2d 41 (5th Cir. 1974); *Helfenbein* v. *Intern'l Industries, Inc.*, 438 F.2d 1068 (8th Cir. 1971), *cert. denied*, 404 U.S. 872 (1971); *Power Replacements, Inc.* v. *Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970); *American Safety Equip. Corp.* v. *J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968). And in New York (the only state in which the issue has been clearly decided), it has been held that state antitrust issues are not arbitrable under a state arbitration act. *Aimcee Wholesale Corp.* v. *Tomar Products, Inc.*, 21 N.Y.2d 621, 237 N.E.2d 223 (1968); *Schacter* v. *Lester Witte & Co.*, 52 A.D.2d 121, 383 N.Y.S.

Petitioner claims (Pet. 12-13) that it was barred by the April 2, 1976 injunction from seeking arbitration of its dispute with UNC, and that therefore its pursuit of judicial remedies may not be construed as a waiver of its arbitration rights. Both the premise and the conclusion are unsound. Petitioner was entirely free under the April 2 injunction to demand arbitration with UNC, subject only to the condition that, if judicial supervision of the arbitration became necessary, it would be undertaken in the District Court. At a hearing on April 2, during a colloquy on the form of the injunction to be entered and in response to a question from counsel for petitioner, the District Court made clear that petitioner was not enjoined from demanding arbitration subject to the general judicial supervision of the court (App. B, *infra*). In short, petitioner was at liberty throughout the pendency of the April 2 injunction to move to stay the Santa Fe litigation and arbitrate with rather than litigate against UNC, yet chose not to do so.[26] Instead, only one month after that injunction was entered, and at a time while enforcement of the injunction was stayed by the New Mexico Supreme Court (see p. 4, *supra*), petitioner in its answer to the complaint expressly disavowed any intent to invoke its right to arbitrate issues going to the validity of the supply contract, and its actions thereafter were consist-

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2d 316 (1976). The reasoning underlying those decisions applies with equal force here. See Loevinger, *Antitrust Issues as Subjects of Arbitration*, 44 N.Y.U. L. Rev. 1085, 1089-1091 (1969).

[26] Petitioner has on numerous occasions acknowledged that it fully understood that the injunction left it free to demand arbitration in the Santa Fe litigation. See, *e.g.*, page 15, note, of the petition in No. 76-1640; Transcript of proceedings on November 7, 1977, relating to GAC's motion for immediate dissolution of the April 2, 1976 injunction, pp. 5-4 to 5-5; page ix, note 3, of GAC's opening brief on the appeal now pending in the New Mexico Supreme Court; and page 6 and pages 13-15, n.12 of the instant petition. In short, petitioner's statement (Pet. 12) that "[f]or more than 20 months [the April 2 injunction] prevented GAC from bringing the issues under the 1973 agreement to arbitration * * *" is simply incorrect.

ently directed towards securing a judicial resolution of its dispute with UNC. Moreover, petitioner had initiated judicial action against UNC inconsistent with any intent to arbitrate well prior to that injunction (see p. 8, *supra*).

In sum, the District Court had authority under the Federal Arbitration Act to decide whether petitioner was "in default in proceeding with" arbitration, and its determination of that issue, applying established principles of law to the particular facts of this case, was correct and does not warrant review by this Court on extraordinary writ.

CONCLUSION

The motion for leave to file a petition for a writ of mandamus should be denied.

Respectfully submitted,

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April 17, 1978.

APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
SANTA FE COUNTY

Wednesday, February 22, 1978

No. 11,775

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,
vs.
GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,
Defendant-Appellant,

INDIANA AND MICHIGAN ELECTRIC COMPANY, and
THE DETROIT EDISON CO.,
Defendants-Appellees.

This matter coming on for consideration by the Court upon renewal of motion for expedited appeal, and the Court having considered said renewal of motion and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that renewal of motion for expedited appeal be and the same is hereby granted. The Transcript on Appeal was filed February 20, 1978; the Brief in Chief will be due on or before February 27, 1978; the Answer Brief will be due on or

before 20 days from the date of filing of Brief in Chief; Reply Brief will be due five days from the date of filing of the Answer Brief. The Court will set the matter down for oral argument as soon thereafter as the regular schedule will permit.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX B

Excerpt from the Transcript of Proceedings in the District Court of the State of New Mexico, Santa Fe County, No. 50827, on April 2, 1976 (Tr. 7-8, 21-22).

[7] THE COURT: Does United Nuclear have any objections to the terms of the Preliminary Injunction applying equally to them as it does to the Defendants?

MR. BIGBEE [Counsel for UNC]: We have no objections.

MR. THOMPSON [Counsel for GAC]: We summarize by stating that we believe that we should not be foreclosed, in spite of what the Plaintiff has stated at this point.

THE COURT: Without making any ruling on your position, it seems to me that both parties should be in the same position, one should not have privileges that the other does not have.

I cannot see how any injunction against litigation could apply to the Defendants unless it applied equally to the Plaintiff.

MR. THOMPSON: The next point—at this point, we would like to ask for clarification. I have also raised the question of the possibility of the Defendants desiring to exercise their rights to arbitration in this case, under Article 17 of the Contract, which is in issue in this case.

THE COURT: Subject to the supervision of this court.

[8] MR. THOMPSON: That is correct. We would ask that the Injunction be clear in excluding any prohibition against us demanding arbitration in this case.

MR. BIGBEE: It is clear enough anyway, anything they want to file in this action will be subject to your Honor's decision.

THE COURT: Did you, Mr. Bigbee, in your application for a Preliminary Injunction contemplate that the Defendants be enjoined from arbitrating under the Arbi-

tration Clause of the Contract in this form [*sic*] subject to the jurisdiction of this Court?

MR. BIGBEE: I did not. I understood that it may or maynot [*sic*] come up. I have asked repeatedly if they want arbitration, they have never answered me; I think they waived it. That is not the point that I wanted an Injunction on. Anything they want to submit under their responsive pleadings, under the rules, they are entitled todo [*sic*] it.

* * * *

[21] [THE COURT:] If an injunction is appropriate in this case, and I have found that it is, I think its terms and language should be very broad: I think that it is appropriate also, there is no purpose in patching all the holes in the inner tube except the one, and I cannot see where any damage will accrue to the defendants by reason of an injunction of this nature. They are not stopped from continuing to have their manufacturing process—they are not stopped in any way from fully litigating their rights. They are just limited to one form [*sic*] in doing so. I am going to grant the Preliminary Injunction with the broad language in it and the requirement that no bond or security be given. I have added at the end of the appropriate Preliminary Injunction, that the Injunction against the Defendants shall bind Plaintiff to the same terms.

MR. BIGBEE: We have no objections to that.

THE COURT: I don't think there is anything in the language here that relates to [22] arbitration in this forum pursuant to the arbitration clause contained in the contract. If there is any question about it, that can be clarified.

MR. BIGBEE: There is no question that they have the right to include that, whether it should be granted or what it is, under Your Honor's jurisdiction.

see

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